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A Proposal for the Development of an International Constitutional Court

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Limitations of International Law in Confronting the Rise of Authoritarian Power and Protecting Human Rights: A Proposal for the Development of an International Constitutional Court

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Dedicated to All of 'The Originals' Across All Disciplines Who Question the World We Live In, Challenge Preconceptions and Strive for Their Dreams.[1]

[1] Adam Grant, *Originals: How Non-Conformists Move the World* (Viking Publishing, 2016).

'Within a system which denies the existence of basic human rights, fear tends to be the order of the day. Fear of imprisonment, fear of torture, fear of death, fear of losing friends, family, property or means of livelihood, fear of poverty, fear of isolation, fear of failure. A most insidious form of fear is that which masquerades as common sense or even wisdom, condemning as foolish, reckless, insignificant or futile the small, daily acts of courage which help to preserve man's self-respect and inherent human dignity. It is not easy for a people conditioned by fear under the iron rule of the principle that might is right to free themselves from the enervating miasma of fear. Yet even under the most crushing state machinery courage rises up again and again, for fear is not the natural state of civilized man.'

[Aung San Suu Kyi, *'Freedom from Fear'* Speech, 1990][2]

[2] Aung San Suu Kyi, 'Freedom from Fear' (Speech, 1990) Available at: 'Aung San Suu Kyi's Essay "Freedom from Fear"', (Asia Society, 2011) http://sites.asiasociety.org/asia21summit/wp-content/uploads/2011/02/1.-Aung-San-Suu-Kyi-Freedom-from-Fear.pdf Last Accessed July 2017.

Abstract

Limitations of International Law in Confronting the Rise of Authoritarian Power and Protecting Human Rights: A Proposal for the Development of an International Constitutional Court

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The international community has never been more fragmented: authoritarianism and nationalism increasingly prevail despite a fully-fledged globalised world of interconnectivity and an abundance of power-sharing structures and institutions seeking to neutralise and balance such conflicting political affiliations and interests. This is exacerbated further by tensions between states which often render them on the cusp of full-scale military intervention and/or force,

in clear contravention of international law. Thus, for many of us we live in a 'state of fear', wherein our political representatives instil in us a terror of the unknown, 'the other', and utilise this in order to implement politically-favourable policies and deviate from their constitutional and human rights obligations, often invoking the justification of a 'state of exception'. Within this 'state of fear' we are blinded by, and confined within, a perpetual 'state of exception'. On the face of it, the victims are the citizens of the afflicted states, whose constitutional and human rights protections have been infringed- however, if we gauge victimhood from a long-term angle, we will perhaps discover that the greatest harm will be suffered by the international institutions and international law as a whole. The impact on the infrastructure will prove most deleterious. I assert that we must combat this unpredictability of the enforceability and clout of international law, especially with regard to human rights protections, through strengthening the constitution of international law and its mandate in order to prevent future deviation by authoritarian states.

In 1999 the government of Tunisia, spearheaded by former Tunisian President Mohamed Moncef Marzouki, recommended to the international community the establishment of an International Constitutional Court, akin to that of the International Criminal Court, in order to denounce constitutions, unconstitutional actions and elections. Although these efforts made headway in striving for the creation of an International Constitutional Court, in this paper I hope to seize the baton, so to speak, and further advance the necessity of such an institution on a theoretical plane.

As each day passes, the media and politicians construct and reveal new groups, individuals and states whom we should supposedly collectively fear- and yet fear and isolationism will prove more detrimental in the long-term to the status of human rights than any actions of those we are taught to fear. If we allow ourselves to

respond to authoritarianism and the inherent fear which typifies it by compromising human rights and the structures of international law to a level of irreparability, then not only do we afford these self-appointed 'masters' the satisfaction of doing so, but we also send a message to the world that exceptionalism warrants a breaking from human rights obligations. If we normalise this rule, the message becomes clear: during periods of exceptionalism, we all bear the risk of being reduced to the 'bare life' of the 'Homo Sacer', and such a determination will not be our own to make. In the comfort of our 21st century, western capitalist lives, most of us have proven to be the deciders, or at least not the victims ('Homo Sacer')- but as the tide of change sweeps over our globalised world, we increasingly see a protectionist and fearful world of increased authoritarianism within which the number of deciders has been reduced to a select few, and the number of 'Homo Sacer' has proliferated. Post-09/11, we all must now bear the risk of being reduced to 'bare life': exceptionalism reigns supreme. In such a vitriolic context, where we are all capable of becoming victims of authoritarianism, we must fight for human rights protections with more zeal than ever. We must refrain from simply responding to a fearful-world with a corresponding fear and regression from our institutions and international norms- such a primitive instinct is impulsive and counterintuitive, tarnishing decades of progress by international institutions and international law, their mandate is to prevent such situations, we merely must empower them to do so.

……..

Keywords: International Constitutional Court, International Law, Human Rights, Authoritarianism, Global Constitutionalism, State of Exception.

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Chapter 1: Introduction

*'I'm sorry, but **I don't want to be an emperor**. That's not my business. **I don't want to rule or conquer anyone.** I should like to help everyone…we all want to help one another. Human beings are like that…The way of life can be free and beautiful, but **we have lost the way…***

***Greed has poisoned men's souls,** has barricaded the world with hate, has goose-stepped us into misery and bloodshed…*

To those who can hear me, I say- do not despair.

*The misery that is now upon us is but the passing of greed- the bitterness of men who fear the way of human progress. The hate of men will pass, and dictators die, and **the power they took from the people will return to the people.**'*

[Charlie Chaplin, *'The Great Dictator'* (1940)] [3]

Travelling forwards over 70 years from the release date of '*The Great Dictator'* (1940) and the lamentations of Charlie Chaplin amid the heinous atrocities committed in Nazi Germany, how can we reconcile the fact that our world is plagued with spectres akin to those we had hoped and worked tirelessly to

[3] Charlie Chaplin, Final Speech in *'The Great Dictator'* (Charles Chaplin Film Corporation, 1940). Transcript available at: http://www.charliechaplin.com/en/synopsis/articles/29-The-Great-Dictator-s-Speech. Last accessed July 2017.

confine to history books? How is it possible that these elements of the past we largely disassociate ourselves from, foreshadow our present-day reality? Can we truly plead the international entrenchment of human rights law and thus, human progress, faced with such an actuality?

In the wake of the Second World War, the world was shaken to its core; subsequently, the nation state structure, modelled on the notion of an impenetrable state sovereignty, which had proven robust historically, was unequivocally remodelled and realigned in favour of international cooperation, dialogue and a more formally interconnected community of states. Thus, we witnessed the establishment of the United Nations (UN),[4] and the signing of the United Nations Charter in 1945,[5] which demonstrated the commitment of then 51, now 193,[6] member states to 'maintain international peace and security',[7] 'save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights.'[8] Likewise, a regional example of the European Coal and Steel Community (ECSC),[9] which was founded by The Treaty of Paris in 1951,[10] provided further impetus for supranationalism through endeavouring to connect states for the purposes of economic growth and as a preventative measure to ensure a lasting peace.

[4] The United Nations, thenceforth referred to as the 'UN'.
[5] United Nations, Charter of the United Nations, 24 October 1945 1 UNTS XVI. Available at: http://www.refworld.org/docid/3ae6b3930.html Last accessed July 2017.
[6] United Nations, 'Growth in United Nations Membership, 1945- Present'. Available at: http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html Last accessed July 2017.
[7] United Nations, Charter of the United Nations, 24 October 1945 1 UNTS XVI, Preamble. Available at: http://www.un.org/en/sections/un-charter/chapter-i/index.html Last accessed July 2017.
[8] *Ibid.*
[9] The European Coal and Steel Community, thenceforth referred to as the 'ECSC'.
[10] Treaty Establishing the European Coal and Steel Community, commonly referred to as The Treaty of Paris (1951). Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:xy0022 Last accessed July 2017.

Thus, an intricate body of international legal norms has been carefully constructed and enforced through the legal mechanisms of said international organisations and their subsidiaries. At the crux of these norms are what we may refer to as 'international constitutional law', 'peremptory norms' or 'international legal doctrine'- these norms set the parameters of state responsibility regarding the protection of human rights both domestically and internationally.

Despite this seemingly optimistic backdrop following WW2, the international community has struggled to maintain stability and peace between increasingly divergent states, coupled with a resurgence of nationalism and authoritarianism which has ignited further discord. The aforementioned institutions, norms and mechanisms are being tested to their limits. Thus, how can we strengthen these institutions and their mandates in order to preclude future abandonment of international human rights obligations?

In this paper, I hope to advance and develop the proposal of the former Tunisian President, Mohamed Moncef Marzouki,[11] who recommended to the international community the establishment of an International Constitutional Court,[12] akin to that of the International Criminal Court, [13] in order to denounce constitutions, unconstitutional actions and elections.

It is with such an intention, and within this increasingly fearful and vitriolic setting, exemplified by an upsurge in 'states of exception', that I proceed with my analysis. In order to do so, permit me first to advance a rebuttal to the reasoning of Chaplin

[11] Former President of Tunisia, Mohamed Moncef Marzouki, is a Tunisian human rights activist, physician and politician. He was elected as President of Tunisia by the Constituent Assembly on 12 December 2011, before being defeated by Beji Caid Essebsi in November-December 2014 elections.

[12] International Constitutional Court, thenceforth referred to as 'IConC' for ease of understanding.

[13] The International Criminal Court, thenceforth referred to as the 'ICC'.

that we must merely wait for a natural return to a 'state of normalcy', despite potential human rights abuses in the interim period. The price of such a waiting game is not only high, but the result is also far from certain- ultimately, it is a game we must refrain from playing.

I. 'The Hate of Men Will Pass': A Rebuttal

Although one concurs with Chaplin's understanding of the natural ebb and flow of human progress, it appears nonsensical to rely upon it to justify heinous crimes and authoritarian behaviour. Instead, it appears necessary to depart from this logic of viewing the troughs as an inevitable by-product of the sporadic peaks. Why should we settle for this erratic sequence, when we could instead embrace our vices, not abscond and find preventative solutions? If we fail to create an innovative way of preventing the depth of trough we have seen historically and continue to see in the present-day, then we will remain shackled to this sequence and our histories will prove ironically homogenous and linear.

Moreover, if we accept an inevitability of this cycle, then we will remain forever fearful of the next trough. The world we see before us, post-09/11,[14] is one tainted by a fear-instilled populace, provoked further by politicians who utilise this fear in order to pursue unjust and unconstitutional policies. Resultantly, an age of authoritarianism and exceptionalism has prevailed. Thus, if we are capable of preventing the troughs from occurring, or limiting them, then we are able to break the cyclical nature of our histories and more actively promote human progress.

[14] 11 September 2001 Terrorist Attacks, United States. Thenceforth referred to as '09/11'.

Although we of course cannot erase our histories, we are capable of learning from our past mistakes and should refuse to settle for the inevitability of the aforementioned cycle.

II. Institutional Fearlessness and Flaws: Locating the Void

Indeed, after the Second World War, the initial refusal to accept this natural ebb and flow saw the aforementioned creation of the UN and the ECSC- both of which aimed to ensure peace and stability for future generations, the former largely politically and socially, the latter more so economically. Although the international institutions which were established in the 1940's and 1950's may have taken a variety of forms, their aims and intentions were alike, namely finding preventative solutions to build a more stable world, simply, the pursuit of the linear in international relations.

These institutions have, in the main, faced new challenges with fearlessness and have moulded their capabilities and mandates according to new threats posed to the global/European communities. Though not consistently proving wholly fruitful, their ability to mould themselves to a constantly fluctuating terrain is commendable. In recent years, we have witnessed some states attempt to detach from, and disassociate with, said international organisations; we are indeed spectators of an increasingly isolationist world which is tainted by fear- a natural result of the growing number of 'states of exception'. What we seek, therefore, is a return to normalcy and greater interaction with international organisations, in order to truly protect human rights.

How can we translate this increasing disassociation of many states from the world of international law and international organisations? On whose door-step do we lay the blame? Or perhaps more usefully, in which area do we require reform? Over the years, international law has proven more successful in its endeavours than it has detrimental, although this is of course worthy of debate. It is not my stance, although it may be that of many reputable legal commentators that the system of international law needs to be dismantled and reconstructed. I strongly believe that such a measure would be counter-intuitive- the phrase 'if it ain't broke, don't fix it' immediately comes to mind.[15] Rather, I would assert that the system which has been carefully-constructed over decades, which has without-doubt withstood the test of time merely needs updating and refining.

Perhaps the most ground-breaking update which we have seen in recent years is the establishment of the ICC, through The Rome Statute of the ICC (1998).[16] Although many criticisms of this latest initiative have surfaced, including its costliness and the vast resources and man-power it requires in order to function effectively- in my mind, its mandate and the extension of criminal jurisdiction from the local terrain to the international stage is pioneering and positive. With this backdrop set, the former President of Tunisia, Mohamed Moncef Marzouki, recommended to the international community the establishment of an International Constitutional Court in 1999, [17] akin to that of the ICC, in order to denounce constitutions,

[15] 'If it ain't broke, don't fix it': 'said when you recognise that something is in a satisfactory state, and there is no reason to try to change it' (Cambridge Advanced Learner's Dictionary and Thesaurus, Cambridge University Press) Available at: http://dictionary.cambridge.org/dictionary/english/if-it-ain-t-broke-don-t-fix-it Last accessed July 2017.

[16] Rome Statute of the International Criminal Court, U.N. Doc A/ CONF. 183/9 Available at: http://legal.un.org/icc/statute/romefra.htm Last accessed July 2017.

[17] His Excellency Mr. Moncef Marzouki, President of Tunisia, 'Statement Summary' (General Assembly of the United Nations, 67th Session, 27 September 2012) Available at: https://gadebate.un.org/en/67/tunisia Last accessed July 2017.

unconstitutional actions and elections. It is upon these theoretical foundations that I aim to cultivate his proposal, and translate it into a model capable of practical application in the future.

We will return to the proposed solution of an International Constitutional Court (IConC) shortly, but in the meantime, we are forced to posit the question of how it is possible that the international community boasts an abundance of organisations and a coherent body of international law, and yet we live in such an unstable world? If we merely add yet another institution, with a similar mandate and enforceability mechanism into this melting-pot, will it suffer the same fate? It saddens me to admit that our existing international mechanisms are often futile in attempting to influence key thinking and events in certain political and constitutional situations. For example, at one particular moment in time, a legitimate and democratic state may be upholding international law, adhering to its human rights obligations and diplomatic ties between itself and other states may be strong and positive. However, a moment later, with a change in political leadership or direction, its interaction with the international community can alter drastically and its domestic protection of human rights and adherence to constitutional law diminish. We must therefore, beg the question of whether the aforementioned institutions which have been carefully-crafted are ultimately futile if a foundational protective mechanism does not exist- namely, an organisation for international constitutional protection? Such an institution could prevent or hold to account any deviation from the key tenets of international law, and could prove especially beneficial in circumstances such as that of an illegitimate or unrepresentative election.

The international community has largely accepted the extension of criminal jurisdiction, albeit a concurrent, complementary power-sharing mechanism, from the local to the global- is it not a natural assertion that such an extension is also

required in the interests of the constitutional world as a preventative measure, which would also in turn ease the burden placed on the ICC?

III. Building Bridges: The 'Constitutionalisation' of International Law

The purpose of this paper is to suggest an alternative solution to the plight of the international community we see before us- comprised of increasingly authoritarian, isolationistic states who are distorted by a 'state of exception', which is ironically proving more perpetual than it is a finite state. I assert that the mechanisms and institutions which have been constructed over decades are only capable of proving effective when certain domestic political and constitutional arrangements are in place, but are rendered largely futile when that terrain changes.

Moreover, if we allow leaders and politicians to manipulate their way around and through these institutions- the age-old criticism of the unenforceability of international law will reign supreme it seems. How do we grant the existing institutions teeth to act decisively? We locate the root of the problem through determining the inadequacies in the existing system- where is the void which politicians and leaders alike are exploiting? Can we truly sit-idle and allow them to jeopardise decades of progress, expanding this void to an irreconcilable degree until the structure crumbles? Or do we instead choose to build an overarching bridge which strings together the mandate of all previous mechanisms, strengthening the system as a whole and preventing the possibility of future deviation from

individuals and political parties who seek power and influence above the pursuit of justice and the protection of human rights.

*'Let us **fight to free the world**- to **do away with national barriers**- to do away with greed, with hate and intolerance.'* [18]

[18] Charlie Chaplin, Final Speech in '*The Great Dictator'* (Charles Chaplin Film Corporation, 1940) Transcript available at: http://www.charliechaplin.com/en/synopsis/articles/29-The-Great-Dictator-s-Speech. Last accessed July 2017.

Chapter 2: On the Cusp of a Constitutional World in 'Crisis': The Domestic Paradigm

*'The Chinese use **two brush strokes** to write the word "**crisis**". One brush stroke stands for **danger**; the other for **opportunity**. In a crisis, be aware of the danger- but **recognise the opportunity**.'*

[John F. Kennedy, 1959][19]

In order to ascertain if we are indeed in the midst of an international 'crisis', fraught with authoritarian states and a neglect of the rule of law, constitutional protections and thus human rights, we must first define how we are to understand 'crises' and analyse our understanding of exceptionalism and then identify whether a global crisis does in fact exist. Upon establishing these requisites, we must then prove that this crisis is of such a severity and worrisome in nature that it demands the international community's full attention. It is only in this way that we are able to set the backdrop to my thesis, prevent the arguments herein from falling victim to allegations of immateriality and assert the dire need for an IConC with conviction.

Therefore, we begin by dissecting our understanding of the term 'crisis', and asking ourselves what we can learn from the word in plotting a course forwards. In Chinese,

[19] John F. Kennedy, Former President of the United States, 'Speech at United Negro College Fund' (Fundraiser, Indianapolis Indiana, 12 April 1959) Available at: https://www.jfklibrary.org/Research/Research-Aids/Ready-Reference/JFK-Quotations.aspx#C Last accessed July 2017.

as per the abovementioned quotation, the word 危机 (*weiji*) can be separated into two distinct concepts- the former character (危) denotes a 'danger', the latter (机) has numerous connotations, including a 'crucial point', 'opportunity' or 'pivot'.[20] Drawing on this conception of a 'crisis' we can view it as both a dangerous situation, coupled with the potential of providing a turning-point. Applying this translation to our current predicament of constitutional law, we can transform the danger we see, and fear we feel, into a positive opportunity to refine the mechanisms and institutions of international law. Thus, the emotions and reactions we commonly-associate with a crisis, such as fear and hopelessness, the raw sentiments which often lead to 'states of exception' can instead be translated into notions of progress and evolution. In this way, we can reconceptualise our 21st century predicament in a positive-light, framing it as an opportunity to redefine the parameters of state responsibility regarding human rights protections.

Bearing this in mind, we next turn to examine our understanding of 'crises' in more detail, exploring the notion of a 'state of exception' and differentiating it from a 'state of normalcy' by analysing both the events of 1933, the turning point for the Nazi party in Germany, and the dynamics of our post-09/11 world. In this way, we can identify how exceptionalism creates a dichotomy of 'us' vs 'them', which, when translated into the domestic domain of constitutional legal protections, proves most dangerous. Next, we are required to understand the vitriolic backdrop within which 'states of exception' function, how they got there and where they are naturally heading if left undisturbed. We do so through exploring the post-09/11 world in which we live- characterised by fear, propaganda and exclusivity. The latter proving especially threatening to the nature of human rights, as exclusivity in

[20] Definition of 'Crisis' in Chinese: 危机: 危 meaning 'danger' , 机 meaning 'opportunity', 'crucial point' etc. (Pleco Chinese Dictionary).

determining and attributing constitutional protections stands in firm opposition to the key tenets of universal human rights.

After we have examined the concept of a crisis in terms of 'states of exception', within the context of 1933 Nazi Germany and post-09/11 policies, it is necessary to broaden our understanding of 'constitutional crises' by drawing upon the analysis of Sanford Levinson and Jack Balkin.[21] Their commentary on 'Constitutional Crises' has proven particularly valuable to my research, and thus their model of categorising the various permeations of possible 'constitutional crises' has been replicated in my work, though our directions and conclusions ultimately differ. My subsequent analysis focuses predominantly on their category (1) crises ('states of exception'),[22] as this is the area which is arguably the most concerning in terms of evidence of derogation from international human rights norms, and thus the category which best demonstrates our need for an IConC and the identification and recognition of international constitutional legal norms.

Lastly, we determine if this 'crisis' situation is constitutional in nature, and thus can be confronted and remedied utilising a constitutional lens of analysis. Thus, if we are capable of locating consistency and widespread evidence of constitutional legal issues internationally across a plethora of states with diverse political, social, cultural, religious backdrops, then we will be well-placed and well-evidenced in the assertion that we are indeed witnessing an imminent 'constitutional world in crisis'. Through proving the commonality of these constitutional issues across different

[21] Sanford Levinson, Jack Balkin, 'Constitutional Crises' *University of Pennsylvania Law Review* (February 2009) Vol. 157 (3) Available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1017&context=fss_papers Last accessed July 2017.
[22] *Ibid.* pp. 721- 729.

states and across a lengthy duration, we will likewise demonstrate that this is not merely a situation 'in flux' which is capable of being naturally remedied. If such a situation was likely to organically dissipate given a little time, we would surely be guilty of mistakenly seeking solutions to unsubstantiated problems. However, given our prior analysis which showcased the need to confront authoritarianism, the abuse of power and the neglect of human rights protections and constitutional law, and not merely elevate these deviations to a sphere of acceptability through characterising them as a natural ebb and flow of human progress, we can negate this notion of a situation 'in flux'. After all, we cannot rely on the notion that 'the hate of men will pass',[23] nor can we settle for the depths of troughs we have witnessed historically-continuity and progress ultimately demand fearlessness and proactivity, not apathy.

I. Normalised Crises & 'States of Exception'

*'When the **state of exception** begins to **become the rule**.'*

[Giorgio Agamben][24]

The concept of a 'state of exception' was coined by the jurist and political theorist Carl Schmitt in the 1920's; [25] the original term in German,

[23] Charlie Chaplin, Final Speech in '*The Great Dictator'* (Charles Chaplin Film Corporation, 1940) Transcript available at: http://www.charliechaplin.com/en/synopsis/articles/29-The-Great-Dictator-s-Speech. Last accessed July 2017.

[24] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Meridian, 1998) pp. 168-169. Cited in: Stephen Humphreys, 'Legalizing Lawlessness: On Giorgio Agamben's State of Exception' *The European Journal of International Law* (2006) Vol. 17 (3) p. 687. Available at: http://www.ejil.org/pdfs/17/3/208.pdf Last accessed July 2017.

'*Ausnahmezustand'*,[26] is often translated as 'state of emergency' or 'state of exception'. Although Schmitt's legacy is somewhat tarnished by the work he undertook for the Nazi regime in justifying their actions,[27] his academic research on the roots of power and sovereignty have proven invaluable in helping us to understand the politics of the world we live in, especially concerning authoritarian regimes and their legal agendas. The term 'state of exception', in all its forms, loosely denotes the extent to which constitutional norms and the rule of law can be disregarded, or deviated from, by the executive/sovereign in the wake of, or perceived threat of, an emergency, with limited checks on said power. Gross (2000) depicts Schmitt's stance on exceptionalism in stating:

'The exception is comprised of sudden, urgent, usually unforeseen events or situations that require immediate action, often without time for prior reflection and consideration…according to Schmitt, the existence of exceptional situations refutes the formal face of legal liberalism, which argues that pre-established general norms cover and apply to all possible situations.'[28]

In his seminal work, *Die Diktatur* (1921),[29] Schmitt explored the power of declaring a 'state of emergency' which is granted to the Office of the President. To Schmitt, this power was praised as 'dictatorial', viewing the mechanism of executive power

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[25] 'Carl Schmitt', *Stanford Encyclopedia of Philosophy* (1 October 2014). Available at: https://plato.stanford.edu/entries/schmitt/ Last accessed July 2017.

[26] Marin Terpstra, Theo De Wit, 'Walter Benjamin and Carl Schmitt: A Political-Theological Confrontation'. Available at: http://marinterpstra.ruhosting.nl/publicaties.html Last accessed July 2017.

[27] 'Carl Schmitt', *Stanford Encyclopedia of Philosophy* (1 October 2014). Available at: https://plato.stanford.edu/entries/schmitt/ Last accessed July 2017.

[28] Oren Gross, 'The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the Norm-Exception Dichotomy' (Symposium- Carl Schmitt: Legacy and Prospects- An International Conference in New York City: Exception and Emergency Powers) 21 *Cardozo Law Review* (1999-2000) p. 1827.

[29] Carl Schmitt, *Die Diktatur* (Berlin: Duncker & Humblot,1994); Carl Schmitt, *Dictatorship* (Cambridge: Polity Press, 2014, English trans.).

as more effective and immediate during times of crisis, than the process of legislative power and decision-making through parliamentary dialogue. According to Schmitt:

'If the constitution of a state is democratic, then every ***exceptional*** *negation of democratic principles, every exercise of state power independent of the approval of the majority, can be called dictatorship.'*[30]

Thus, to Schmitt, at the crux of his understanding of executive power was a dictatorial element, enshrined within the Constitution, which inherently allowed for decisive and deviatory action by the sovereign. His emphasis on the word 'exceptional' is pivotal in our examination, as it stands in direct juxtaposition to the norm, legal certainty and the continual non-derogatory protection of human rights for all. With this interpretation, sovereignty is inherently the power to decide on the 'exception' and declare a 'state of emergency' in order to suspend the current law and ultimately create a new constitution.

However, in recent times, the lines between exceptionalism and normalcy, dictatorship and democracy have become blurred to such an extent that it is often difficult to judge where on the spectrum states stand, exacerbated and obscured further by the machines of propaganda. Where states fall into the former category of exceptionalism, this is often difficult to decipher on account of being normalised to such an extent that the exception seems to be, and is presented as the norm. Thus, often the most troubling feature of contemporary 'states of exception' lay in the fact that such exceptionalism is no longer a clearly-identifiable malfunction in the normal life of a state, but instead is a perpetual ailment which is often carefully-crafted to appear terminal in nature, and thus deviation from the new norm, namely

[30] Carl Schmitt, *Die Diktatur* (Duncker & Humblot,1994) s. XV p.11.

the exception, is often impermissible. In this way, we increasingly see the starting position as exceptionalism. If it is indeed true that we are confronted with a situation wherein an executive is capable of continually deviating from their constitutional and international legal obligations as a matter of 'normality'- this 'exceptionalism' has thus become 'the rule'.

Notably, this exceptionalism does not apply uniformly to all under the ambit of the sovereign's power, it is spatialized, and within this division emerges the 'homo sacer' and 'qualified life' dichotomy of 'us' vs 'them, which will be later expounded by Giorgio Agamben.

'For Schmitt, the relationship between friend and enemy is always spatialized, both "taking place" somewhere, but also producing an original and decisive division of space.'[31]

How can we plead universal human rights protections and an elevated respect for the rule of law on the international stage if states and their executives are able to deviate from the will of the legislative and judicial branches at will, construct exceptional spaces and render executive power unchecked and teetering on the balance of authoritarianism? If we are to concur with this appraisal of the normalcy of 'states of exception' and their commonality, then the need for an international check on executive powers through the creation of an international constitutional mechanism has never been more urgent.

Schmitt's work is commonly cited by legal theorists who wish to invoke the theory of strong executive power in order to justify practices which contravene international law, for example torture or measures taken in the interests of national security. Therefore, in order to comprehend how authoritarian regimes manipulate

[31] Claudio Minca, Rory Rowan, *On Schmitt and Space* (Routledge, 2015) p. 89.

the system of law and order in order to strengthen their grip on power and implement their often controversial policies, we must understand from where they derive their power theoretically, and how this is then translated into an unchecked legalised power. In this way, Schmitt provides for us an academic portal through which we are better-placed to understand authoritarianism and how we end-up in such vitriolic situations. The turning point is often the moment when a 'state of exception' or 'state of emergency' is declared; if we are capable of locating this 'fork in the road' then we can discern the exact moment where intervention is necessary to prevent worsening conditions. A 'state of exception' is an ailment of a state, a breaking away from its normal conditions- after all, the term is often described as being roused by a 'threat to the life of a nation'.[32] In order to resuscitate the state to 'normalcy', we must understand the symptoms and be equipped and prepared to identify them ahead of time, capable of reacting swiftly and preventing further deterioration in condition.

Post-09/11, the international community has oft proven reluctant to identify many state situations as 'crises' and refrained from reacting and intervening with candour and conviction, despite said states displaying many of the worrying symptoms we have identified as precursors of the deterioration of a state into a perpetual 'state of exception'. We must ask ourselves why international institutions which were established to protect against such situations and ensure lasting peace and security, are proving ill-equipped to intervene and act? Schmitt would perhaps argue that the deficiencies we see in the international legal infrastructure can be attributed to the fact that the mechanisms have '[disregarded] the state of exception, and [pretended]

[32] Richard Burchill, 'When Does an Emergency Threaten the Life of the Nation? Derogations from Human Rights Obligations and the War on International Terrorism' *New Zealand Yearbook of Jurisprudence* (2005) Vol. 9 pp. 96-114. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1343444 Last accessed July 2017.

that the legal universe is governed by a complete, comprehensive and exceptionless normative order.'[33] As Gross (2000) has described, taking Schmitt's assertions to their natural conclusion, would mean a 'complete destruction of the normal by the exception' and thus an 'authoritarian exceptionless exception'-[34] pivotally, it is this trend which we can increasingly identify in state behaviour and thus this is the direction which we must strive to prevent. The international community, which is largely based on universal norms and yet allows for exceptionalism through derogatory provisions within human rights treaties etc., has attempted to find a balance between normalcy and exceptionalism in this way, but to little avail. The balancing act between protecting state sovereignty in times of supposed 'exceptionalism' and ensuring international human rights are guarded throughout is yet to be achieved, with the latter paying the ultimate price. With the proliferation of instances of alleged 'exceptionalism' or 'emergency/crisis' situations in the domestic sphere, we can no longer neglect this interplay in legal academia.

'We must contend with a reality in which the fusion of normalcy and exception leads to an ever-greater role for the latter at the expense of the former.'[35]

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[33] John McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (Cambridge University Press, 1997) pp. 124-129. Cited in Oren Gross, 'The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the Norm-Exception Dichotomy' (Symposium- Carl Schmitt: Legacy and Prospects- An International Conference in New York City: Exception and Emergency Powers) 21 *Cardozo Law Review* (1999-2000) p. 1828.

[34] Oren Gross, 'The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the Norm-Exception Dichotomy' (Symposium- Carl Schmitt: Legacy and Prospects- An International Conference in New York City: Exception and Emergency Powers) 21 *Cardozo Law Review* (1999-2000)
p. 1829.

[35] Oren Gross, 'The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the Norm-Exception Dichotomy' (Symposium- Carl Schmitt: Legacy and Prospects- An International Conference in New York City: Exception and Emergency Powers) 21 *Cardozo Law Review* (1999-2000)
p. 1857.

I assert that the deficiencies we see in the legal mechanisms of the international community are not a matter of apathy, but more so an indicator that the operating theatre is not well-equipped to perform the surgery required. Having analysed the symptoms, later in this paper we will turn our attention to examining a number of states which are presently queued outside the operating theatre, and posit why physicians have failed to treat their ailments. In sum, why has international law proven ill-equipped to confront these states which teeter on the edge of exceptionalism, and could an IConC offer a remedy? Importantly though, we cannot allow for a complete usurpation of the norm by the exception on the international level- after all, the definition of the latter ('exceptionalism') is grounded in the former, without a notion of the 'norm' we cannot locate 'exceptionalism'. Thus, a world devoid of 'normalcy' would resemble a normalised exception, and the inevitable exception to this new norm would surely catalyse an even more tumultuous situation.

'Not only have emergencies expanded to an even greater number of nations, but within the affected nations, it has extended its scope and strengthened its grip. Observations that "[e]mergency government has become the norm" can no longer be dismissed. While rejecting Schmitt's solutions, we should not ignore the important questions that he raises.'[36]

[36] Arthur Miller, 'Constitutional Law: Crisis Government Becomes the Norm' 39 *Ohio State Law Journal 736* (1978) ('predicts that crisis governments will become a worldwide norm') Cited in Oren Gross, 'The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the Norm-Exception Dichotomy' (Symposium- Carl Schmitt: Legacy and Prospects- An International Conference in New York City: Exception and Emergency Powers) 21 *Cardozo Law Review* (1999-2000) p. 1830.

A. The Danger of Agamben's *Homo Sacer*: 'Under the Spell' of Law[37]

'Perhaps [today] we are all virtually homines sacri'.[38]

Giorgio Agamben, an Italian philosopher, examined and developed the aforementioned work of Carl Schmitt and wrote extensively on the 'state of exception'. His central premise was the reduction of people to 'bare life' or 'homo sacer', as opposed to 'qualified life' by a sovereign power- the former as an exceptional situation wherein the rights of certain individuals are withdrawn.[39]

'"Bare life" is undoubtedly a powerful and revealing metaphor. It accurately sums up the perversity of a world, which, while being more integrated than ever before, is also able to isolate and push whole swathes of people to the margins, for example refugees, slum dwellers, terrorist suspects etc…they are the first victims of an ever-encroaching sovereign power over life.'[40]

'Homo Sacer', Latin for 'the accursed man' conveys (in Roman law) the exclusion of someone from accepted society, an outlaw. Legally the term denotes someone who could be killed without the perpetrator being rendered a murderer and being held accountable for their crime- this individual is not merely excluded from society,

[37] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Translated by D. Heller-Roazen, Stanford University Press, California, 1998).
[38] *Ibid.* p. 115. Cited in: Simon Behrman, 'Giorgio Agamben in Perspective' *International Socialism: A Quarterly Review of Socialist Theory* (Issue 140, 7 October 2013) Available at: http://isj.org.uk/giorgio-agamben-in-perspective/ Last accessed July 2017.
[39] *Ibid.*
[40] Simon Behrman, 'Giorgio Agamben in Perspective' *International Socialism: A Quarterly Review of Socialist Theory* (Issue 140, 7 October 2013) Available at: http://isj.org.uk/giorgio-agamben-in-perspective/ Last accessed July 2017.

but also from the law.[41] In his work, he draws upon the example of the concentration camps used by the Nazi regime during WW2, as he explains how the camp conditions were so inhumane that we are unable to register the crimes on the ordinary spectrum of humanity and law- thus, they were permitted under the exceptional laws of the Nazi regime.[42] When a 'state of exception' materialises, to Agamben, the victims ('outlaws') lose their right to defend themselves, they are rendered voiceless by the regime and their agency over their own life is removed. In this way, 'Agamben identifies the state of exception with the power of decision over life.'[43] The distinction Agamben makes is between the Greek 'Bios' (the life of the citizen) and 'Zoe' (the life of the homo sacer), and this is often decided by those who hold power.[44] It is this vast 'machinery of power' which we must analyse, in order to 'halt it in its tracks.'[45] In direct correlation to Agamben's 'homo sacer' is Michel Foucault's notion of 'biopolitics', which draws on the central idea that sovereignty is no longer based on territory, but instead on the control of populations.[46]

'This acting of power directly on our bodies, on life itself, is biopolitics.'[47]

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[41] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Translated by D. Heller-Roazen, Stanford University Press, California, 1998) p. 183.
[42] *Ibid.*
[43] Jacques Ranciere, 'Who is the Subject of the Rights of Man?' *South Atlantic Quarterly* (2004) Vol. 103 (2-3) pp. 297-310.
[44] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Translated by D. Heller-Roazen, Stanford University Press, California, 1998) p.1.
[45] Simon Behrman, 'Giorgio Agamben in Perspective' *International Socialism: A Quarterly Review of Socialist Theory* (Issue 140, 7 October 2013) Available at: http://isj.org.uk/giorgio-agamben-in-perspective/ Last accessed July 2017.
[46] Michel Foucault, *Security, Territory, Population: Lectures at the College de France 1977-1978* (Palgrave Macmillan, 2009). Cited in Simon Behrman, 'Giorgio Agamben in Perspective' *International Socialism: A Quarterly Review of Socialist Theory* (Issue 140, 7 October 2013) Available at: http://isj.org.uk/giorgio-agamben-in-perspective/ Last accessed July 2017.
[47] *Ibid.*

We need look no further than Guantanamo Bay in the United States of America to identify a suitable case study for such a distinction. The detainees are deprived of their basic human rights and thus placed outside of the law, their lives are reduced to 'bare life' or 'homo sacer'. In response to such a dehumanising situation, often prisoners or detainees undertake hunger strikes as an act of defiance and attempt to regain the power over their own lives and find their voice. The reaction from the authorities in such circumstances is often to force-feed prisoners and detainees in order to keep them alive, however, this is yet another attempt to confine a human being to the 'homo sacer'. Pivotally, such spaces are a state-construction, the sovereign determines who is to be afforded legal personality and 'qualified life' within their space, and who must be stripped 'bare' and yet remain within their sovereign space, albeit the exceptional/auxiliary space of concentration camps, detention centres, military prisons, refugee camps etc. Such spaces are located, although ordinarily within the territory of a sovereign, on the margins of the law and human rights protections; it is within such exceptional spaces that we witness grave human rights violations, spaces where existing international legal mechanisms and norms struggle to reach. Let us draw upon the plight of the Rohingya Muslims of Myanmar for evidence of these spaces- the Rohingya, who have faced ethnic cleansing by Buddhist majorities in Rakhine State, Myanmar, reside in degrading conditions in internal displacement camps. Erased from Burmese history and culture, disenfranchised from censuses and elections, the Rohingya have become 'stateless', outcastes from all spaces and responsibility. [48]

[48] For further discussion please see: Tim Frewer, 'A Love of Sovereignty: Borders, Bureaucracy and The Rohingya Crisis- Analysis' (Eurasia Review, 22 December 2015) Available at: http://www.eurasiareview.com/22122015-a-love-of-sovereignty-borders-bureaucracy-and-the-rohingya-crisis-analysis/ Last accessed July 2017.

Although a 'homo sacer' is deprived of their rights as a citizen, their life is still protected as 'sacred'- in this way they are 'under the spell' of law.[49] Whereas, Schmitt aimed to defend the concept of a 'state of emergency' by including it within our understanding of the rule of law, Agamben identifies the danger of allowing the executive to determine who are the 'Bios' (qualified lives who have rights of citizens), and 'Zoe' (bare lives, mere bodies). As early as Aristotle, people have been separated into two forms, 'an animal born to life' and the pursuance of 'the good life…achieved through politics'.[50] The former being akin to the 'homo sacer', which is only capable of being transformed into 'qualified life' (Bios) through the state. As such, the sovereign is equipped with the power to make the determination between legal entities and mere bodies with no legal or human rights protections- they decide who is within their boundaries and who are the 'outlaws'.

Therefore, to Agamben the line between dictatorship and democracy is a blurred one- the indefinite suspension of law under 'states of emergency' is the precursor to the former, but often under the guises of politics and fear, the transition from the latter to the former becomes less clear. It is in this space of uncertainty and volatility that spaces governed by exceptionalism reign supreme and prove to be perpetual.

In such situations, where can we locate universal human rights and international law? Even if we are to accept that at the crux of the notion of sovereignty is the power to decide on the exception, the international community cannot allow for such a broad exceptional space wherein a state can devalue people, whether citizens or aliens, to mere bodies. If the Second World War taught us nothing else, it clearly demonstrated our need to elevate humanity and universal human rights above

[49]Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Translated by D. Heller-Roazen, Stanford University Press, California, 1998).
[50] *Ibid.* p.66.

domestic law and sovereignty: international law shall not be confined to a transient, 'spell-like' state.

B. Lessons from 1933: A Post-09/11 World of Terror, Propaganda and Exclusivity

*'The **people can always be brought to the bidding of the leaders**. That is easy. All you have to do is **tell them that they are being attacked** and **denounce the pacifists** for lack of patriotism and exposing the country to danger. **It works the same way in every country**.'*

[Hermann Goering, Nuremberg 1946][51]

A great deal of academic discussion after the Second World War focused on the initial 'emergency' measures and laws which were promulgated in line with the Weimar Constitution in Germany, in the years building up to the atrocities of the holocaust. Article 48 of the Weimar Constitution has stood centre stage of such analyses.[52] This provision provided for the suspension of 'fundamental rights' in circumstances where there was a threat to 'security and public order'.[53] Hitler used this provision repeatedly throughout his administration to allow for the

[51] Gustav M. Gilbert, *Nuremberg Diary* (New York: Farrar, Strauss, 1947) pp. 287-279. Gilbert was an allied psychiatrist who spoke with Goering during the Easter recess of his trial, 18 April 1946. Cited in David Abraham, 'The Bush Regime from Elections to Detentions: A Moral Economy of Carl Schmitt and Human Rights' *University of Miami Legal Studies Research Paper no 2007-20* (October 2006, University of Miami) p.12. Available at: http://ssrn.com/abstract=942865 Last accessed July 2017.
[52] Constitution of the Weimar Republic of Germany (1919-1933), Article 48.
[53] *Ibid.*

implementation of his policies, and in this way, he legally suspended the rule of law to create a norm of 'legal lawlessness'.[54] With most present-day state constitutions containing a similar clause, permitting derogation from human rights protections in times of exceptionalism or emergency, we can clearly see that this is a slippery slope between normalcy and exceptionalism on a global scale. The example of Article 48 and its use by the Nazi regime stands at the furthest possible end of the exceptionalism spectrum, and provides our greatest warning, resultantly, this is where we begin.

On 27 February 1933, the home of the German parliament building in Berlin, the Reichstag, was set alight allegedly by a Dutch council communist who was subsequently arrested and sentenced to death. The Nazi party used this attack as evidence that communists had been plotting against the German government. Many commentators have alleged that this arson attack was fabricated by the Nazi party as propaganda, to instil fear in the people. Irrespective of who the perpetrator was factually, the attack was used as propaganda and proved heavily influential in the initial establishment of the Nazi regime. Less than one month previously, Adolf Hitler had become the Chancellor of Germany- one of his initial endeavours was advising the then President Paul von Hindenburg to pass an emergency decree to suspend the protection of civil liberties and suppress the Communist Party of Germany, in line with Article 48 of the Weimar Constitution.[55] Mass arrests of alleged communists followed, leaving many empty seats in Parliament; before long the Nazis had become the majority party and Hitler had largely unchecked power.

[54] Thanos Zartaloudis, *Giorgio Agamben: Power, Law and the Uses of Criticism* (Routledge-Cavendish, 2010) p. xiv.
[55] Constitution of the Weimar Republic of Germany (1919-1933), Article 48.

The aforementioned emergency decree, entitled the Enabling Act (1933),[56] aimed to grant the Chancellor the power to pass legislation by decree, and thus bypass the Reichstag and their debate and approval. Once in place, such arrangements were in place for 4 years, and then were renewable for a boundless duration- thus resulting in a limitless 'state of exception'. Ordinarily, under Article 48 of the Weimar Constitution (1919),[57] the President was capable of exercising this decree power during a time of emergency- but the Enabling Act extended this jurisdiction to the Chancellor instead, namely Hitler. In order to pass this legislation through parliament, a two-thirds majority was required, and at this time the Nazi party only held 32% of the seats in the Reichstag.[58] Thus, the party's campaign focused on the supposedly dire need to pass the aforementioned law in order to prevent communists from instigating a full communist revolution. The support which the regime gained, perhaps goes some way to demonstrate the sheer power of propaganda and inciting hatred to create groups of 'us' and 'the other' or the 'homo sacer'.

After the Reichstag fire on 27 February 1933, Chancellor Hitler requested for President Hindenburg to pass the Reichstag Fire Decree which severely limited numerous civil liberties, including: freedom of expression, freedom of the press, peaceful assembly and habeas corpus. This decree was subsequently promulgated and the application of various rights to certain groups remained in place throughout the duration of the Nazi regime. As a result of widespread intimidation of politicians and the public at large, huge numbers of arrests and the use of

[56] The Enabling Act (1933), Amendment to the Weimar Constitution, (German: Ermachtigungsgesetz).
[57] Constitution of the Weimar Republic of Germany (1919-1933), Article 48.
[58] David Abraham, 'The Bush Regime from Elections to Detentions: A Moral Economy of Carl Schmitt and Human Rights' *University of Miami Legal Studies Research Paper no 2007-20* (October 2006, University of Miami) Available at: http://ssrn.com/abstract=942865 Last accessed July 2017.

propaganda to instil a fear of communism, the Enabling Act was passed on 23 March 1933. Thenceforth, Hitler had the power to rule by decree and the unchecked executive power which he had carved-out for himself was cemented into law, and the 'state of exception' rendered boundless.

As Professor David Abraham, Professor of Law at the University of Miami, has commented: 'the "genius" of the Nazis…lay not primarily in lies and deceptions (though certainly there were and would be plenty of those) but in being able to exaggerate and transform a real attack by their real enemies and to use it for their ends.' [59] Professor Abraham asserts in his work that the arson attack on the Reichstag in February 1933 was indeed an attack on the government and was not fabricated by the Nazis as many critics claim- what we instead saw was the power of propaganda and inciting fear in the people. [60]

We need not look too far for present-day parallels of terror, fear and 'us' vs 'them' dichotomies which continue to punctuate 21st century examples of 'states of exception'. Professor Abraham juxtaposes the events of the Reichstag Fire in 1933, with the Al-Qaeda attacks on the United States of America on 11 September 2001. He explains:

'America was attacked in the Homeland…at its very iconic centers of business and military power, the World Trade Towers of Manhattan and the Pentagon in Washington. This was something Americans could hardly conceive of…it was widely, and correctly, remarked at the time that George W. Bush became President

[59] *Ibid.* p.8.
[60] *Ibid.*

not upon inauguration in January 2001 but on September 11…that was the moment of Bush's Reichstag fire.'[61]

In the aftermath of 09/11, the USA-PATRIOT Act was passed within 30 days. The full title of this legislation reads: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001.[62] Reminiscent of the Enabling Act of 1933 passed in Nazi Germany, the legislation enabled the executive to enact legislation without the prior consent of the legislature, and in the wake of 09/11 we saw the immediate arrest and secret detention of more than 1200 predominantly Muslim resident aliens. As Professor Abraham summarises:

'Thus was born the War on Terror that has brought us all the terror of war.'[63]

The powers granted to President George W. Bush under this Act found their root, allegedly, in his role as Commander-in-Chief during times of war, and the Use of Military Force Resolution which was passed by Congress in the days following 09/11. The Resolution granted 'the President to use all necessary and appropriate force against those nations, organisations or persons he determines planned, authorised, committed or aided the terrorist attacks.'[64] During this time,

[61] *Ibid.* pp. 8-9.
[62] USA PATRIOT ACT, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (26 October 2001, 107th Congress) Available at: https://www.congress.gov/bill/107th-congress/house-bill/03162 Last accessed July 2017.
[63] David Abraham, 'The Bush Regime from Elections to Detentions: A Moral Economy of Carl Schmitt and Human Rights' *University of Miami Legal Studies Research Paper no 2007-20* (October 2006, University of Miami) p10. Available at: http://ssrn.com/abstract=942865 Last accessed July 2017.
[64] 'Authorization for Use of Military Force' Senate Joint Resolution 23 (107th Congress, United States, 2001-2002). Cited in: David Abraham, 'The Bush Regime from Elections to Detentions: A Moral Economy of Carl Schmitt and Human Rights' *University of Miami Legal Studies Research Paper no 2007-20* (October 2006, University of Miami) p10. Available at: http://ssrn.com/abstract=942865 Last accessed July 2017.

approximately 80,000 men from numerous mostly Muslim states were called to attend 'voluntary' interviews at Immigration and Naturalization Offices, under a Special Registration Program- around 14,000 of these individuals were subsequently deported. The result of such measures was 'an intensified long-term fear of terrorism [accompanied by] a "second order" regime terrorism'.[65] As Agamben explains: 'President Bush's decision to refer to himself constantly as the "Commander in Chief of the Army"…must be considered in the context of this presidential claim to sovereign powers in emergency situations.'[66] In this way he was able to blur the very distinction between peace and war, and with regard to the latter, the ability to distinguish between a foreign and civil war.[67]

A lasting legacy of President George W. Bush will be his success in blurring these boundaries of war and peace, foreign war and civil war. In much the same way, he also called into question the common interpretation of 'prisoners of war' and the application of the Geneva Conventions (1949).[68] In reference to the aforementioned military order declared by President George W. Bush on 13 November 2001, Agamben explains:

> *'What is new about President Bush's order is that it radically erases any legal status of the individual, thus producing a legally unnameable and unclassifiable being. Not only do the Taliban captured in Afghanistan not enjoy the status of*

[65] David Abraham, 'The Bush Regime from Elections to Detentions: A Moral Economy of Carl Schmitt and Human Rights' *University of Miami Legal Studies Research Paper no 2007-20* (October 2006, University of Miami) p13. Available at: http://ssrn.com/abstract=942865 Last accessed July 2017.

[66] Giorgio Agamben, 'A Brief History of the State of Exception: An Excerpt from *State of Exception'* (2005) Available at: http://www.press.uchicago.edu/Misc/Chicago/009254.html Last accessed July 2017.

[67] *Ibid.*

[68] The Geneva Conventions (1949); Geneva Convention III on Prisoners of War (1949) Available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp Last accessed July 2017.

POW's (Prisoners of War) as defined by the Geneva Convention, they do not even have the status of people charged with a crime according to American laws.'[69]

From 2001 these detainees were rendered 'enemy combatants', or for our purposes 'homo sacer', and excluded from the legal protections of the Geneva Conventions by the US government, under the US Military Commissions Act of October 2006.[70]

With the United States at the centre of our world order, as Professor Abraham explains: 'being the hegemon means that such practices will be contagious and become accepted by at least some of America's allies.'[71] This is worrying on various levels, and perhaps explains why I chose to parallel the 1933 situation of Nazi Germany with specifically, a post-09/11 United States - notably, because the stance of the US has tainted the global order and this nationalistic fear and propaganda has shattered through the domestic ceiling and has warped international law and policies (ironically it has warped the very laws and institutions which were established to prevent the arguably comparable 1933 Nazi Germany from reoccurring). This is precisely why we are forced to confront the issues we see in the domestic sphere of constitutional law on the international stage, and thus why I am asserting the need for an IConC. With legal commentators, such as Levinson and Balkin, contending that changes in media technology and warfare perhaps place the United States at the point of 'a downward slide towards Caesarism, with presidents who claim greater and greater unaccountable authority in order to fight a

[69] Giorgio Agamben, *State of Exception* (2005, University of Chicago Press) p. 3.
[70] Military Commissions Act (2006) (United States, 109th Congress) Available at: https://www.congress.gov/bill/109th-congress/senate-bill/3930 Last accessed July 2017.
[71] David Abraham, 'The Bush Regime from Elections to Detentions: A Moral Economy of Carl Schmitt and Human Rights' *University of Miami Legal Studies Research Paper no 2007-20* (October 2006, University of Miami) p14. Available at: http://ssrn.com/abstract=942865 Last accessed July 2017.

never-ending war against hidden enemies'[72] - can we truly trust the supposed 'beacon of freedom and democracy' to set the benchmark for constitutional legal protections of human rights on the international stage? Should we question whom we entrust with the power of being a role-model for developing and transitioning states? Should we create a constitutionally-mandated international institution to set and rule on these standards? I advocate for the latter proposal as a more certain protection of human rights.

If we are capable of paralleling 1933 Nazi Germany with post-09/11 US policies, then arguably we should refrain from asserting that the latter is a bastion for human rights and democracy and instead of elevating it to a status of superiority, angering those who are labelled US 'enemies', we should instead hold them accountable for their unconstitutional actions. Furthermore, if a state which appears to be increasingly authoritarian in its actions is setting the precedent, the enemies which they have identified for their own populace, often fabricated through propaganda and fear, translates into enemies of the international community- at which point politics and power-play between states too-heavily influences and dictates international legal norms and compliance. Professor Abraham, whilst quoting Ulrich Preuss, conveys it most succinctly in stating:

> *'When a Power is the protector of the international constitution, so to speak, the very real danger exists that "the enemies of the hegemonic state appear to be the enemies of all humanity".'*[73]

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[72] Sanford Levinson, Jack Balkin,'Constitutional Crises' *University of Pennsylvania Law Review* (February 2009) Vol. 157 (3) p. 750. Available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1017&context=fss_papers Last accessed July 2017.

[73] Ulrich Preuss, '*Abschiedsvorlesung an der Freien Universitat'*, z. T. in der FAZ, (9 May 2006), p. 10. Cited in: David Abraham, 'The Bush Regime from Elections to Detentions: A Moral Economy of Carl Schmitt and Human Rights' *University of Miami Legal Studies*

II. Testifying a Constitutional World in 'Crisis': Tales of Turbulence

During periods where 'states of exception' or 'states of emergency' are invoked by the executive, the defence for such extreme measures is often a perceived, or perhaps a merely fabricated, threat to the security of a nation or its people. In such theoretically exceptional circumstances, it is argued that the constitutional legal frameworks which are in play during periods of 'normalcy' may constrain measures and policies which may be necessary in order to tackle the threat, and thus are deviated from within the confines of domestic legal legitimacy. Although historically this took the form of military necessity, from a direct and substantiated threat of war from another state, the spectrum of possible bases upon which a 'state of exception' can be declared has ballooned. With new interpretations of 'war', 'sovereignty' and 'jurisdiction' challenging the foundations of international law, opportunities for disregarding constitutional protections has ballooned in tandem. The executive branches of states, thus often perform their powers largely in a domestic legal vacuum- it is during times of 'exception' that not only do we discover who is truly sovereign, but also how much power they have carved-out for themselves. In this vein, President George W. Bush tellingly coined himself 'the decider' after the events of 09/11.[74]

Research Paper no 2007-20 (October 2006, University of Miami) Available at: http://ssrn.com/abstract=942865 Last accessed July 2017.

[74] David Abraham, 'The Bush Regime from Elections to Detentions: A Moral Economy of Carl Schmitt and Human Rights' *University of Miami Legal Studies Research Paper no 2007-20* (October 2006, University of Miami) p. 17. Available at: http://ssrn.com/abstract=942865 Last accessed July 2017.

As we momentarily look beyond the sphere of the United States for examples of 'constitutional crises', let us first recall the importance of the Nazi regime and the holocaust in not only catalysing the creation of the international institutions we aim to strengthen, but also in serving the overarching reminder of what is at stake and why the direction we choose today will dictate the global order for decades to come. According to Samantha Power, a US human rights figure, 'holocaust consciousness' is vital in politics on account of it providing 'a moral life preserver in a sea of interest-based callousness.'[75]

'From Armenia to Auschwitz, from former Yugoslavia to Rwanda, from Rwanda to Iraq, the cycle of "interest-based callousness" had permitted evil forces to destroy millions of lives.'[76]

In order to ascertain if the crisis which we are facing is of such a magnitude and breadth that it warrants our attention, we must look beyond the historical case of Nazi Germany, and further than merely the present-day US 'War on Terror'. We must locate consistency in the duration and extent of constitutional issues across a multitude of varying nations, diverse in histories, cultures and religions. It is only through demonstrating constitutional crises across an array of states and forms that we can proceed with fruitful arguments and analysis, and propose an IConC as a possible remedy. Thus, I will endeavour to satisfy this requirement through highlighting constitutional crises sporadically, beginning with 2001 as the turning point for modern states in a post-09/11 world, and extending to 2017. This will hopefully serve as evidence of how widespread constitutional issues are in the

[75] Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Basic Books, New York, 2002).

[76] David Abraham, 'The Bush Regime from Elections to Detentions: A Moral Economy of Carl Schmitt and Human Rights' *University of Miami Legal Studies Research Paper no 2007-20* (October 2006, University of Miami) p.21. Available at: http://ssrn.com/abstract=942865 Last accessed July 2017.

domestic sphere, and thus why there is a demand for a constitutionally-mandated international institution.

To proceed in a methodical way, we first need to acknowledge and examine the different categories of crises which exist, according to the analysis of the aforementioned Levinson and Balkin.[77] Although it may render my research more burdensome, it is important to recognise the variation in how states function, their constitutional structures and legal orders- thus, by extension, the variation in how states struggle and find themselves in the midst of 'constitutional crises'.

Ultimately, we must refrain from merely accepting the assertions of such thinkers as Carl Schmitt, and must instead refute their theoretical replacement of the norm (representing law and order) by exceptionalism (representing chaos and disorder), which threatens the very foundations of our international and domestic legal and political orders. In Gross' (2000) concluding remarks on Schmitt's exceptionalism, he beautifully acknowledges his own personal familial ties to the holocaust and the Nazi regime, in order to highlight that his critique is not merely a formal academic endeavour: 'it is a matter of life, and even more so, of death.'[78] It is worth remembering this as we proceed, that the theoretical can never be entirely detached from the realities of the political and legal domains.[79]

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[77] Sanford Levinson, Jack Balkin, 'Constitutional Crises' *University of Pennsylvania Law Review* (February 2009) Vol. 157 (3) Available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1017&context=fss_papers Last accessed July 2017.

[78] Oren Gross, 'The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the Norm-Exception Dichotomy' (Symposium- Carl Schmitt: Legacy and Prospects- An International Conference in New York City: Exception and Emergency Powers) 21 *Cardozo Law Review* (1999-2000) p. 1868.

[79] Zeev Sternhell, Mario Sznajder, Maia Asheri, *The Birth of Fascist Ideology: From Cultural Rebellion to Political Revolution* (Princeton University Press, 1994)

A. Measuring and Categorising Crises

We must bear in mind that the term 'constitutional crisis' is often used too liberally- labelling any time of conflict between government institutions as such. 'But the mere existence of conflict, even profound conflict, cannot be the definition of crisis.'[80] In any system of checks and balances between the branches of government, there is an inherent need and desire for the branches to continually disagree with one another, and consequently conflict. Cautiousness is required in preventing the same fear we see taint our perceptions of the world post-09/11, from being transposed into a fear of a 'constitutional crisis'. Overstatement without evidence is of course dangerous, but where circumstances indicate a 'crisis' we should not fear labelling it as such, nor be apathetic in confronting it.

> *'People have evoked the expression "constitutional crisis" so often that it is in danger of becoming synonymous with almost any deeply felt sense of conflict or urgency, as illustrated by Chief Justice Roberts' plaintive cry that he deserves a higher salary. Perhaps it has become no more than a marker of emotional intensity.'*[81]

For some, 'constitutional crises' are 'givens of history… [which] do not call for particular identification or definition…everybody knows when one happens.'[82]

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[80] Sanford Levinson, Jack Balkin, 'Constitutional Crises' *University of Pennsylvania Law Review* (February 2009) Vol. 157 (3) p. 711. Available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1017&context=fss_papers Last accessed July 2017.

[81] *Ibid.* p.714.

[82] Charles A. McClelland, 'The Acute International Crisis', *World Politics* Vol. 14 (1961) p. 2096. Cited in Keith Whittington, 'Yet Another Constitutional Crisis?' *William & Mary Law Review* (Vol. 43 (5)) (2002). Available at: http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1498&context=wmlr Last Accessed July 2017.

Though I concede that there is little to gain from the term's over-usage, we must also admit that rendering it 'undefinable' restrains our ability to understand crises and makes us ill-prepared in identifying the early-warning signs which are capable of preventing the materialisation of fully-fledged crises. In line with the classical interpretation of 'states of emergency', we are required to locate the 'common denominators' of 'temporal duration and [an] exceptional nature',[83] but in recent years such indicators are often difficult to decipher or are fabricated. The Questiaux Report, which was created by the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, similarly identified the key tenets of an 'emergency model' as including: '(1) the fundamental precept on limiting governments in bringing states of emergency into effect is consistency between emergency legislation and democratic principles; (2) emergency legislation predates the occurrence of the crisis; (3) such legislation contains a *priori* or a *posteriori* control procedures on the exercise of those emergency powers; and (4) such legislation and powers are to be applied as provisional, temporary measures.'[84]

In such a way, in our subsequent analysis of whether 'constitutional crises' have materialised, we must use said models and precursors to determine whether our present-day 'emergency' situations are in fact conforming to our international models of exceptionalism. Through identifying evidence from state legislation, policy decisions, executive orders, case law and constitutional documents, we will likely prove well-equipped to decipher examples of states amidst exceptionalism, and better able to judge to what extent they fall within the remit of our expected international model. Although the international community may be capable of

[83] Oren Gross, 'The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the Norm-Exception Dichotomy' (Symposium- Carl Schmitt: Legacy and Prospects- An International Conference in New York City: Exception and Emergency Powers) 21 *Cardozo Law Review* (1999-2000) p.1834.
[84] *Ibid.* p. 1855.

confronting exceptional states which conform to this model, they appear to be struggling with post-09/11 examples of exceptionalism due to their indeterminacy and the sheer scope of their application. As Gross (2000) has most poignantly stated:

'Following the traditional view concerning the normalcy- emergency relationship has led domestic, as well as international judicial organs to give too little attention to, if not ignore altogether, the phenomena of permanent, entrenched, or de facto emergencies in the cases coming before them…this has led to attempts at solving the questions at hand by applying the wrong medicine because of a faulty diagnosis. By perpetuating a myth that emergencies follow a constant pattern, and by failing to identify shifting patterns of crisis management, academic commentary, court jurisprudence, and institutional international actors fail to adequately come to terms with the various phenomena of emergencies.'[85]

It is worth noting that brandishing all states with the same brush, and failing to take account of differences in how and why state exceptionalism emerges, will ultimately render international efforts futile, after all:

'Happy countries, paraphrasing Tolstoy, may indeed look alike, but every unhappy country is unhappy very much in its own way.'[86]

Levinson and Balkin assert, and I am inclined to agree, that depicting 'constitutional crises' as issues with 'constitutional design' is far preferable to locating 'constitutional disagreement' which is too all-encompassing.[87] In this way, the moment in which a crisis crystallises is the point at which the system of

[85] *Ibid.* p. 1857.
[86] Rein Mullerson, *Regime Change: From Democratic Peace Theories to Forcible Regime Change* (Martinus Nijhoff Publishers, 2013) p. 2.
[87] Sanford Levinson, Jack Balkin, 'Constitutional Crises' *University of Pennsylvania Law Review* (February 2009) Vol. 157 (3) p. 714. Available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1017&context=fss_papers Last accessed July 2017.

'constitutional design' begins to break apart at the seams: 'a turning point in the health and history of a constitutional order.'[88] To ascertain whether the health of a constitution has been compromised, we must identify actors who assert different constitutional interpretations and thus hold differing opinions of who should hold power and to what degree, only then can we decipher differences in understanding of a state's 'constitutional design'.

'If no one with any institutional authority to oppose the actor, or no mass movement, objects, there is no constitutional crisis, even if there is significant constitutional change, or even revolution.'[89]

Thus, we must constrain our understanding of 'constitutional crises' to three possible situations: (1) Declaring a 'State of Exception'; (2) 'Excessive Fidelity to a Failing Constitution' and (3) 'Struggles for Power Beyond the Boundaries of Ordinary Politics'.[90] My analysis focuses predominantly on (1), 'state of exception' analysis, as this is the area where we have witnessed the most distressing violations of human rights protections both historically (the Nazi regime), and within the context of the alleged 'War on Terror'. Later, I will draw upon type (3) crises, where political protests or armies mobilise and sometimes form a 'coup d'état' in defiance against an existing constitution, with the aim of toppling a regime or the existing constitutional order. Often this 'people power', the showcasing of public dissent against a regime, is catalysed by unconstitutional actions taken by the executive. In the examples later drawn upon, this tool is often a powerful and effective one, although sometimes violent and time-consuming. The more problematic form of type (3) crises are those concerning illegitimate or unconstitutional elections, often tainted by secrecy and corruption which are

[88] *Ibid.* p. 714.
[89] *Ibid.* p. 717.
[90] *Ibid.* p. 714.

difficult to evidence, thus the corresponding 'people power' is often weaker and dissenting voices largely silenced.

In this way, the mandate of the proposed IConC which was advanced by the former President of Tunisia, Moncef Marzouki, is covered within the scope of this analysis, namely: denouncing constitutions, unconstitutional actions and illegitimate and illegal elections. Type (1) crises can be identified when constitutions fail to safeguard against exceptionalism, and when the executive acts unconstitutionally. Likewise, type (3) crises often occur when unconstitutional actions or illegitimate elections catalyse protest and revolutionary struggles. As such, through combining the scope of both Levinson and Balkin's categorisation of 'constitutional crises' and the proposed mandate of Moncef Marzouki's vision of an IConC, we are capable of deciphering how the model itself is capable of corresponding to, and confronting the contemporary domestic reality.

Let me first offer one forethought on the inherent difficulties of category (3) crises, as it is often difficult to determine whether efforts to topple a constitutional order are just or not. Therefore, this category should be treated with special care. It is commonly-cited that 'one man's terrorist is another man's freedom fighter',[91] but in the constitutional legal context a 'terrorist's' intentions are clearly distinguishable from those of a 'freedom fighter'. If we merely compare the objectives and policies of the individual or group who are attempting a type (3) overhaul of the constitutional order, and whether they align with the pursuance of international standards of human rights and constitutional legal norms, then the 'ends' of a more just constitutional order may indeed outweigh the 'means' which may be unlawful or, at that time, unconstitutional.

[91] Conor Friedersdorf, 'Is One Man's Terrorist Another Man's Freedom Fighter?' (16 May 2012, The Atlantic) Available at: https://www.theatlantic.com/politics/archive/2012/05/is-one-mans-terrorist-another-mans-freedom-fighter/257245/ Last accessed July 2017.

For example, in the context of apartheid, the system of racial segregation and discrimination which was in place in South Africa between 1948 and 1991, despite the international community's attempts to eradicate the practices therein. It took such figures as the late- Nelson Mandela and the work of the ANC (African National Congress) to use illegal means to topple the policies and government at that time. In this category (3) crisis, would these figures be branded 'liberators' or 'terrorists'? Considering the practices of other states at that time, customary international law and treaty law, we can easily justify the work of Nelson Mandela and assert that the illegal actions taken were in the best interests of the constitutional order and the state as a whole at that time. As Levinson and Balkin explain: 'it all depends on the justice or injustice of the regime.'[92] It is worth remembering that a 'constitutional crisis' does not necessarily result in the overall protection and preservation of an existing constitution, but may result in the death of a constitutional order, for example the Union of the Soviet Socialist Republics. Sometimes 'constitutional crises' are capable of being 'regarded as a positive good, if the constitution in question leads to outcomes that are deeply unjust.'[93] Irrespective of the eventual outcome on the constitutional order, these circumstances do indeed satisfy the requirements of a 'constitutional crisis'- with the emphasis on 'crisis' as a turning-point in the 'constitutional design' of a state.

[92] Sanford Levinson, Jack Balkin, 'Constitutional Crises' *University of Pennsylvania Law Review* (February 2009) Vol. 157 (3) p. 715. Available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1017&context=fss_papers Last accessed July 2017.

[93] Keith Whittington, 'Yet Another Constitutional Crisis?' *William &Mary Law Review* (2002) Vol. 43 (5) p. 2100. Available at: http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1498&context=wmlr Last Accessed July 2017.

What all three categories of Levinson and Balkin's crises have in common is that they 'are conflicts about the legitimate uses of power by persons or institutions';[94] thus, I proceed by locating case studies which conform to this definition, with particular emphasis on category (1) and (3) crises. The objective of doing so is to detail the intricacies of the constitutional crises we see on the domestic level, so we are better-placed to construct a constitutional legal institution on the international level.

[94] Sanford Levinson, Jack Balkin, 'Constitutional Crises' *University of Pennsylvania Law Review* (February 2009) Vol. 157 (3) p. 716. Available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1017&context=fss_papers Last accessed July 2017.

Chapter 3: Category (1) Crises: Declaring a 'State of Exception'[95]

'Ordinary constitutional norms could and should be suspended ***in time of emergency****, for* ***"[t]here exists no norm that is applicable to chaos."****'*[96]

Arguably the most common-place constitutional crises arise from political leaders self-professing an extension of their powers, allegedly allowing them to derogate from the constitution of said state and international standards of human rights protection. We have previously examined the definition of this category of crises in detail, and thus I will be succinct in merely reiterating it here to aid understanding. In sum, exceptional circumstances, it is claimed, warrant the extension of extraconstitutional powers. In its most extreme form, such exceptionalism is capable of shifting a democracy to a dictatorship- parallels are often made to Caesar's Ancient Rome and the notion of a 'constitutional dictatorship,'[97] alongside Lockean 'prerogative powers'.[98]

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[95] *Ibid.*

[96] Carl Schmitt, *Political Theology: Four Chapters on the Theory of Sovereignty* (1922) (George Schwab trans., Chicago: Chicago University Press, 2005) p. 13. Cited in: Sanford Levinson, Jack Balkin, 'Constitutional Crises' *University of Pennsylvania Law Review* (February 2009) Vol. 157 (3) p. 722. Available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1017&context=fss_papers Last accessed July 2017.

[97] *Ibid.* pp. 721-722.

[98] Sean Mattie, 'Prerogative and the Rule of Law in John Locke and the Lincoln Presidency' *Review of Politics* (Winter 2005) Vol. 67(1) pp. 77-111.

I. Ambiguity, Theatrics & the Search for Dissenting Voices

'Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists…This is not, however, just America's fight. And what is at stake is not just America's freedom. This is the world's fight. This is civilization's fight.'[99]

It is worthy of note that political leaders rarely explicitly state their deviation from the state's constitution- the art of their theatrics often lay in the framing of their power, and in recent years no president has been so successful as former US President, George W. Bush in casting himself as the ultimate 'protector' in the play entitled 'War on Terror'. Historically this title had often been handed to former US President, Abraham Lincoln.[100] Through their actions we can identify that often, extraconstitutional powers are either kept secret or approaches justified through abstract and creative constitutional interpretation. In the same way as we are no longer able to locate an explicit declaration of war on a sovereign state, we are also often incapable of deciphering a clear declaration of a 'state of exception' or 'state of emergency'- we are forced to merely interpret deviation from the

[99] George W. Bush, Presidential Address to Congress (23 September 2001), cited in: Natsu Taylor Saito, *Meeting the Enemy: American Exceptionalism & International Law* (New York University Press, 2016) p.9.

[100] Abraham Lincoln in a letter to Senator Albert Hodges, noted: '*I felt that measures otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation*.' (4 April 1864), reprinted in *Abraham Lincoln: Speeches and Writings 1859-1865* (Library of America, 1989) p. 585.

constitutional legal norm on a spectrum ranging from the former at one end, and a dictatorship and Lockean 'prerogative powers' at the other.[101] Our tools in judging such deviation and the degree of exceptionalism are constitutional interpretation, the intentions of the political actors invoking said powers and their adherence to the overarching international standards of human rights protections which are so universal and so undisputed in their aims and applicability, that they are simply incapable of being blindly ignored without international accountability.

In addition, within 'state of exception' situations, it is often difficult to decipher the warning signs that a 'constitutional crisis' in fact exists, and thus it is often impossible to identify when we need intervention and a fresh 'outside' perspective of what is happening 'inside'. Faced with fabricated propaganda and political actors who do not explicitly state their extraconstitutional behaviour, how can we decipher when we do in fact need help? If we wait for dissenting voices to appear, will we listen to them? How many dissenting voices are sufficient? Where a nationalistic agenda is roused in a 'state of exception' the propaganda-machine is often reeling out fabricated hate and fear to the populace, and thus dissenting voices are often scarce, or downtrodden, and hidden from view. In such a space, characterised by fear and opinions based on fabricated propaganda, where and how can we uncover such dissent?

If we leave the determination of the necessity or justifiable degree of constitutional deviation in a 'state of exception' to the domestic realm, will we fall victim to only gaining a full comprehension of our situation and the mistakes we have made, in retrospect? Thus, to avoid the excessive abuse we are capable of allowing during that interim period of exceptionalism, we must extend domestic jurisdiction to

[101] Sean Mattie, 'Prerogative and the Rule of Law in John Locke and the Lincoln Presidency' *Review of Politics* (Winter 2005) Vol. 67(1) pp. 77-111.

analyse and decipher the extent of constitutional deviation to an outside body who are better-placed to balance an 'emergency' situation with the need for consistency in respecting and protecting domestic and international human rights norms. It is in this vein that I propose the need for an IConC.

The difficulty in identifying the early-warning signs of a crisis ahead, can be best highlighted with the example of the US policy of the internment of Japanese-Americans during the Second World War. In February 1942, the world witnessed 'the internment of 70,000 American citizens of Japanese descent who resided on the West Coast (along with 40,000 Japanese citizens who lived and worked there).'[102] Levinson and Balkin draw upon this example as proof of the need to locate 'respectable voices objecting to this display of national power',[103] in order to satisfy the prerequisites for such a policy to rouse a 'constitutional crisis'. At the time of Japanese-American internment, numerous members of the ACLU (American Civil Liberties Union) did indeed object to such a move by the Executive,[104] alongside three members of the US Supreme Court. However, the then Attorney General concurred, alongside the national stance of the ACLU, that the policy was acceptable under the exceptional circumstances of the Second World War- thus 'Roosevelt signed the relevant presidential orders in early 1942'.[105] Subsequent

[102] Giorgio Agamben, 'A Brief History of the State of Exception: An Excerpt from *State of Exception'* (2005) Available at: http://www.press.uchicago.edu/Misc/Chicago/009254.html Last accessed July 2017.
[103] Sanford Levinson, Jack Balkin, 'Constitutional Crises' *University of Pennsylvania Law Review* (February 2009) Vol. 157 (3) p. 720. Available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1017&context=fss_papers Last accessed July 2017.
[104] Peter Irons, *Justice at War: The Story of the Japanese-American Internment Cases* (Oxford University Press, 1983) p. 133.
[105] Sanford Levinson, Jack Balkin, 'Constitutional Crises' *University of Pennsylvania Law Review* (February 2009) Vol. 157 (3) p. 720. Available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1017&context=fss_papers Last accessed July 2017.

allegations of extraconstitutional powers have largely not been argued on this issue, although arguments for the clear violation of international human rights, of course, have been frequently-asserted. But Levinson and Balkin clearly convey in their analysis that this internment did not constitute a 'constitutional crisis.'

'The Japanese internment was an extraordinary personal crisis for the victims of American policy and a rank injustice, but it did not amount to a constitutional crisis for the nation at large, at the time.'[106]

Yet, in my mind, it seems that meeting this threshold of 'respectable voices' who dissented from the executive exercising such powers is a difficult one to satisfy- how can we ascertain how many voices are required? Furthermore, how are we judging 'respectability'? In addition to this, even if we are to accept that the majority of 'respectable voices', whatever we do indeed interpret this to mean, hold that such powers are acceptable under the exceptional circumstances of war, are we neglecting to acknowledge how powerful the tools of propaganda and fear are in such circumstances? At a specific moment in time, unchecked by outside observers, a state's policy may seem justifiable- but retrospectively, history has taught us that the global community's judgement, when not clouded by fear or propaganda may judge more harshly the ignorance or blindness of those 'inside' the bubble. Although obviously, hindsight is a fine thing, we must be preventative in our endeavours and not merely reflective in our mistakes. Thus, I assert that such a situation of constitutional deviation should be judged, not by the number of 'respectable voices' within the political space affected at that specific time, tainted by propaganda and fear, but instead an impartial and independent body which is better-placed to make an informed balancing of the interests of an exceptional state

[106] *Ibid.* p. 720.

of war, and the human rights of those concerned. This current legal vacuum is where I assert the need for an IConC.

Furthermore, in the context of the US internment of Japanese-Americans during WW2, this conflict can be distinguished from present-day conflicts and their exceptionalism by the mere fact that it was a clear declaration of war, against clearly-identifiable enemies, and thus a 'state of emergency' could be arguably justified in this context, and arguably by extension, so too could the US policy of internment. Post-WW2, the characteristics of conflict have changed to such an extent that we can no longer draw parallels to warrant exceptionalism which had been justified under previous war-time regimes.

In recent years, the backdrop of post-09/11 law and order has created the ideal foundations upon which to cultivate a 'state of exception', and a breeding ground for derogation from human rights norms and international law. From the outset of the 'War on Terror', constitutional interpretation became increasingly ambiguous and clouded by legal creativity, propaganda machines began spinning theatrics and provoking fear in order to rouse nationalistic sentiment and form a united front against an allegedly common enemy. In due course, dissenting voices were repressed and silenced, and the constitutional infrastructures of many states were torn apart. As political theatrics have taken centre stage, and legal accountability mechanisms have failed to fill the legal voids created by the master politicians, the people therein have largely proven reserved in their reactions to this changing dynamic. This is a dangerous waiting game if the international community is forced to wait at the side-lines for indicators of dissenting opinions within the affected state before it can voice the international stance. Can we simply entrust states to decipher for themselves the necessity and proportionality of their 'state of exception' and the implications on their constitutional and human rights arrangements?

In the same way as a 'state of exception' can be viewed as an ailment of the state and/or its constitution- I prefer to frame it as a psychological condition, a state with an unsound mind and thus judgement. As a logical extension of this, how can we entrust the determination of constitutional deviation and 'acceptable' violations of international human rights norms to such an unsound and volatile body? It is in the best interests of all involved, to grant responsibility and jurisdiction to a sound, outside institution, upon which it can weigh these interests and render a judgement- namely, an IConC.

II. 'The War on Terror': The United States, Australia & France

'The rule of law and ***constitutionalism must be preserved****. Moreover,* ***anti-terrorist legislation itself must include protections****…Free citizens have a right to look to their legislators for proportionality and protection of the rule of law,* ***not mere rhetoric*** *and a* ***bidding war in extreme measures.*** *Unrestrained, unscrutinised governmental power is* ***the path of tyranny.*** *'*[107]

[107] Michael Kirby, 'Terrorism: The International Response of the Courts (The Institute for Advanced Study Branigin Lecture)' *Indiana Journal of Global Legal Studies* (Winter 2005) Vol. 12(1) p. 344. Available at: http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1299&context=ijgls Last accessed July 2017.

A. The United States of America: The After-Shocks of Terror & an Incapacitated Congress

'*The George W. Bush administration has repeatedly suggested that it would be* ***suicidal*** *to require the President* ***to obey either domestic or international laws that conflict*** *with* ***its own best judgments*** *about how to conduct the "****global war on terror****".*'[108]

The ground-breaking year of 2001 proved to be the catalyst for major change in state dynamics and how they interact on the global stage- the terrorist attacks on 11 September 2011 in the United States did most certainly shake the world to its core, and cannot be ignored in our analysis. In reaction to terrorism on US soil, 'the Bush White House quickly [started] talking about the opportunities it presented: to wipe out terrorism, to curtail repressive regimes and even to resolve the Middle East issue'. [109] Indeed, with such an expansive and largely unrealistic mandate, President George W. Bush framed his objectives in such a way as to justify the extension of his powers. A 'War on Terrorism' was subsequently declared, a war with an unknown and largely unidentifiable enemy- a battle labelled as one between 'good' and 'evil', with the United States largely determining which category states, religious groups and individuals fell into. Thus, the spectre of 21st

[108] Sanford Levinson, Jack Balkin, 'Constitutional Crises' *University of Pennsylvania Law Review* (February 2009) Vol. 157 (3) p. 725. Available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1017&context=fss_papers Last accessed July 2017.

[109] Tom Carver, 'Review of 2001, Bush: Man with a Mission' (2 January 2002, BBC News, World Edition) Available at: http://news.bbc.co.uk/2/hi/in_depth/world/2001/review_of_2001/1717313.stm Last accessed July 2017.

century exceptionalism took hold of the international community, and in my mind, no state proved more reactionary in its response than the United States of America.

The constitutional legal mechanisms of the US have proven surprisingly robust considering the fact that the country's recent history has been frequently tainted by authoritarian political leaderships- this is not to say however, that the system is as it should be, or remains in its original form, this is far from the case. The system has proven to be overly-reactionary and not preventative in its function, with the legislature frequently incapacitated when it comes to preventing the passing of unconstitutional laws. The only remaining recourse for balancing executive powers has proven to be the judiciary, who have taken on this mandate of acting as the guardian of the US Constitution with vigour and dedication, despite being overworked. It is commendable though, on the whole, that the constitutional structure has remained in place, and commands ongoing respect and acknowledgement from citizens and the government alike- although the latter may not do so voluntarily, and may instead wait for judicial intervention to ensure they afford it the respect it legally demands. The structure as a whole may still be standing, referring to our previous medical analogy, the body of the constitutional state remains intact, but the ailments are increasingly piercing and destabilising this core. As authoritarian politicians in the US have attempted to stretch the mandate and possibilities of the executive powers provided for in the Constitution, this has in turn threatened the protection of the constitutional human rights therein. With increasing ailments appearing, symptoms of trouble ahead have surfaced- thus, it has fallen on civil society and the judiciary to safeguard the constitutional law of the US.

Not only does this highlight the need for a strong civil society and an independent and impartial judiciary during times of crisis, it also demonstrates how in the case of

the US, a political superpower on the world stage and largely immune from international criticism or scrutiny, any crisis in the domestic domain largely remains a domestic issue. In this way, the US has largely been confined to self-sufficiency and independent of outside involvement during times of crisis, much to the dismay of those opposing these authoritarian leaderships, and by extension, much to the relief of said leaders. It has consequently been left to civil society and the judiciary to act fearlessly and strive for normalcy, amidst the volatile terrain of exceptionalism, to repair the emerging ailments and salvage the core of US constitutional law.

Far from proving preventative, the US constitutional checks and balances system is reactionary and in times of crisis, hugely overwhelmed, forcing some ailments to fall through the net and go unnoticed. Through identifying many of these ailments which have surfaced in the US constitutional legal sphere in the wake of the terror attacks of 09/11, we are able to decipher the most detrimental flaws in the ambit of US constitutional law, and propose where an IConC would be capable of providing checks and balances and strengthen US constitutional law.

Many commentators saw the George W. Bush administration, which was in place both preceding and following the 09/11 attacks, as 'the face of the wolf', and they needed look no further than Carl Schmitt to correspondingly locate 'the mind of the wolf'.[110] Former President George W. Bush took Schmitt's depiction of the 'sovereign [as] he who decides on the exception',[111] broadly and consequently took

[110] Quinta Jurecic, 'Transition 2016: Donald Trump's State of Exception' (14 December 2016, Lawfare Blog) Available at: https://lawfareblog.com/donald-trumps-state-exception Last accessed July 2017.

[111] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (2006, University of Chicago Press) (1922) p.5. Cited in: Bruno Gulli, 'The Sovereign Exception: Notes on Schmitt's Word that Sovereign is He Who Decides on the Exception' (September 2009) Available at:

quick action to enact anti-terror laws which proved exceptional both in their granting of vast executive power and in their ability to incapacitate human rights protections. It was largely in response to 09/11 and the policies of President Bush that Giorgio Agamben published his work, *State of Exception* (2005), 'which turned to the Bush administration as an example of how Schmitt's exception would inevitably expand to swallow law whole.'[112] His work thus acted as a call to arms for all constitutionalists, to take note of this seismic shift in the US political and legal sphere. Although we have not seen a complete breakdown in the rule of law in the US, 16 years on from the events of 09/11, its erosion is apparent and its claims of exceptionalism have proved perpetual. Fundamentally, US citizens deserve a state of normalcy, free from fear and terror- and such a state is yet to naturally materialise.

The initial step taken by the US in direct response to the 09/11 terror attacks was the passing of the Authorization for Use of Military Force Resolution on 18 September 2001, which opened the floodgates to exceptional legislation in the name of counter-terrorism, stating therein that:

'*The President is authorized to use all necessary and appropriate force against those nations, organisations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organizations or persons, in order to prevent any future acts of*

https://www.researchgate.net/publication/38105215_The_Sovereign_Exception_Notes_on_Schmitt%27s_Word_that_Sovereign_is_He_Who_Decides_on_the_Exception Last accessed July 2017.

[112] Quinta Jurecic, 'Transition 2016: Donald Trump's State of Exception' (14 December 2016, Lawfare Blog) Available at: https://lawfareblog.com/donald-trumps-state-exception Last accessed July 2017.

international terrorism against the United States by such nations, organizations or persons.'[113]

Despite the existence of international legal protections and frameworks in place which act as guidance during times of conflict, namely the Geneva Conventions 1949 which will be explored in more detail later, the Bush administration largely deemed the scope of the 'War on Terror' to be outside of the scope of international humanitarian law:

'*It is not, according to the Bush administration, that the United States lacks a commitment to international law but rather that* ***international law is silent on this new frontier****, and like the American Wild West, law and order must be brought to a lawless area through the efforts of latter-day frontiersman, in this case the United States and its partners.'*[114]

In this way, the administration conducted itself largely outside the legal protections of international law, detaining individuals and trying them in military courts, without adequate legal protections and a fair trial- labelled 'unlawful combatants' these post-09/11 'homo sacer' were outside of domestic US legal protections, military law and international law. [115] To the Bush administration, individuals who committed terrorist attacks on US soil were not lawful combatants, and thus did not deserve prisoner of war status. Within this backdrop of a legal vacuum, the US utilised the detention facility of Guantanamo Bay, and prosecuted individuals through military commissions for their alleged terror offences.

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[113] 'Authorization for Use of Military Force' Senate Joint Resolution 23 (107th Congress 2001-2002) (USA, 18 September 2001).
[114] Peter L. Hickman II, 'The Lore of the Laws of War: Textual Constructions of Archetypal Identities in the War on Terrorism' (Dissertation, Arizona State University, ProQuest, April 2014) p. 45.
[115] *Ibid.* p. 46.

The first legislative tool to aid the creation of President Bush's 'state of exception' was the enactment of the aforementioned USA PATRIOT Act, effective on 26 October 2001,[116] having been rushed through Congress, and with only one senator voting against its passage in the US Senate, Democrat Feingold of Wisconsin. Importantly, many of the provisions therein had been debated before in Congress and had been found to contravene the rights of citizens, 'but September 11 had swept away all previous objections.'[117] This bill was 342 pages in length and altered more than 15 pre-existing laws.[118] Upon signing the act into law, President George W. Bush remarked how the USA PATRIOT Act continues to:

'Uphold and respect the civil liberties guaranteed by our Constitution.'[119]

Many legal commentators have rebutted this assertion, especially with regard to the extensive powers of surveillance that it granted the government, in clear contravention of the right to privacy of US citizens. The 4th Amendment to the US constitution stipulates 'the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures'.[120] Thus, in normal circumstances, warrants need to be obtained by law-enforcement officers who wish to infringe this right, and these have to be in turn requested from judges who must hear the evidence for doing so and find 'probable cause' of criminal activity to grant the warrant. This was similarly the case for wiretaps and physical searches- all required such a process of finding 'probable cause' in order to ensure the protection

[116] ACLU, 'The USA PATRIOT Act and Government Actions that Threaten Our Civil Liberties' Available at: https://www.aclu.org/files/FilesPDFs/patriot%20act%20flyer.pdf Last accessed July 2017.
[117] Constitutional Rights Foundation, 'The Patriot Act: What is the Proper Balance Between National Security and Individual Rights?' Available at: http://www.crf-usa.org/america-responds-to-terrorism/the-patriot-act.html Last accessed July 2017.
[118] *Ibid.*
[119] *Ibid.*
[120] The Constitution of the United States (1789), 4th Amendment. Available at: https://www.senate.gov/civics/constitution_item/constitution.htm Last accessed July 2017.

of the constitutional rights of US citizens. Even prior to the enactment of the USA PATRIOT Act, there were numerous exceptions to this need for 'probable cause', most notably for 'pen-trap' orders, where telephone providers would be asked to inform law-enforcement officers of the numbers dialled and the calls received by a certain phone. In such a case, it was accepted practice that proving 'probable cause' was not necessary; an order would be granted by a judge if such phone information was needed for an ongoing investigation. The reasoning given for this different standard was the fact that this information was far less intrusive to US citizens than that of a wire-tap or a physical search.[121]

The PATRIOT Act, under S.215, however, allows for the FBI to request a search warrant from the Foreign Intelligence Surveillance Court (which meets in secret and is comprised of government representatives), in order to search for 'any tangible things' to 'protect against international terrorism or clandestine intelligence activities'- the higher standard of 'probable cause' was thus side-lined.[122] This is capable of being used against any US citizen, whom the FBI believe to be 'associated' with terrorist activities, and with regard to any 'tangible' property. This could include personal medical records, public library records, business documents etc. Most worryingly is that the act further serves as a gagging order, to prevent third parties who have handed-over this data from informing anyone. S.216 allows for an extension of the scope of pen-trap orders to also include emails and web-browsing history.

Most controversially of all is S.213 of the aforementioned act, rendered the 'sneak-and-peek' provision, which allows for the FBI to conduct a secret search on a

[121] Constitutional Rights Foundation, 'The Patriot Act: What is the Proper Balance Between National Security and Individual Rights?' Available at: http://www.crf-usa.org/america-responds-to-terrorism/the-patriot-act.html Last accessed July 2017.
[122] *Ibid.*

citizen's home or business premises in secret, delaying the notification of the search warrant. In order to obtain such permission from a judge, the FBI must merely prove that 'providing immediate notification…may have an adverse result.'[123]

Since the enactment of the USA PATRIOT Act, legal challenges on the basis of contravening the US Constitution have flooded the courts. One example of such a resulting legal controversy concerned Title V of the USA PATRIOT Act, National Security Letters (NSL), which were administrative subpoenas used by the FBI and other agencies to demand data and records from an organisation. Controversially, NSLs allowed for no judicial review or oversight, the recipient of the order was 'gagged' from acknowledging that the NSL had been ordered. Thus, the ACLU (The American Civil Liberties Union) brought a case against the US government, claiming NSLs violated the 1st and 4th Amendments to the US Constitution;[124] this argument was accepted by the court and the provision was held to be unconstitutional. [125]

'In response to criticism of the act, Congress may be having some second thoughts. The House of Representatives voted 309-118 to repeal "sneak-and-peek" searches.'[126]

Interestingly though, public opinion of the PATRIOT Act has remained largely in favour of its application, despite many of its clearly unconstitutional provisions. Indeed, in a Gallup Poll in August 2003, citizens were asked their opinions on the USA PATRIOT Act, they responded: 21% said the Act went 'too far', 55% said 'it

[123] *Ibid.*
[124] The Constitution of the United States (1789), 1st Amendment. Available at: https://www.senate.gov/civics/constitution_item/constitution.htm Last accessed July 2017.
[125] *Doe* v *Ashcroft* 334 F. Supp. 2D 471 (S.D.N.Y 2004) (US).
[126] Constitutional Rights Foundation, 'The Patriot Act: What is the Proper Balance Between National Security and Individual Rights?' Available at: http://www.crf-usa.org/america-responds-to-terrorism/the-patriot-act.html Last accessed July 2017.

is about right' and 19% that 'it does not go far enough'.[127] Thus, if public opinion was largely in favour of constitutional limitations in the name of confronting terrorism, can we label it a 'constitutional crisis'? Arguably, if the citizens therein have been largely indoctrinated by fear-inducing propaganda, then their judgments cannot be the yardstick by which we can judge whether a crisis has materialised or not.

According to the ACLU, in a letter written to the US Senate which argued for the rejection of the USA PATRIOT Act, they stated:

'The USA PATRIOT Act gives the Attorney-General and federal law enforcement unnecessary and permanent new powers to violate civil liberties that go far beyond the stated goal of fighting international terrorism.'[128]

Indeed, the ACLU has also published a report entitled 'Unpatriot Acts' which essentially warned that the freedoms of US citizens were in danger under the USA PATRIOT Act.[129] The overarching question proving to be on everybody's lips: 'what is the proper balance between national security and protecting individual rights?'[130]

In 2006 the USA PATRIOT Act was renewed, maintaining 14 of its 16 provisions and granting them permanent and largely protected legal status.[131] In the wake of its

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[127] *Ibid.*
[128] ACLU, 'Is the USA PATRIOT Act a Good Law?' (June 2017) Available at: http://aclu.procon.org/view.answers.php?questionID=000716 Last accessed July 2017.
[129] Constitutional Rights Foundation, 'The Patriot Act: What is the Proper Balance Between National Security and Individual Rights?' Available at: http://www.crf-usa.org/america-responds-to-terrorism/the-patriot-act.html Last accessed July 2017.
[130] *Ibid.*
[131] Paul Bischoff, 'A Breakdown of The Patriot Act, Freedom Act and FISA', (Comparitech: VPN & Privacy, 6 October 2016) Available at: http://www.comparitech.com/blog/vpn-privacy/a-breakdown-of-the-patriot-act-freedom-act-and-fisa/#different Last accessed July 2017.

renewal, its provisions were used to justify the further collection of mass metadata on millions of American citizens by the NSA (National Security Agency), arguing that such mass collection was required to identify patterns that could uncover and prevent terror plots.[132] Although in 2015 these provisions were somewhat reigned-in by Former President Barack Obama, with the passing of the Freedom Act 2015,[133] especially concerning the collection of mass metadata on US citizens which was deemed to have a tenuous link to combating terrorism- however, on the whole the surveillance state remains largely intact, and thus so too does the uncertain status of the 1st and 4th Amendments to the Constitution.

Although subsequent legal challenges of anti-terror legislation have flooded the courts in the US, not all provisions have faced review and anti-terror legislation has on the whole remained protected. Specific examples of judicial activism are commendable and worthy of note- but we must ask ourselves why we are forced to rely on the courts as the last resort to uphold the Constitution? If we cannot locate checks and balances at the earlier stage of legislative scrutiny and review of bills and legislative proposals, then a fundamental arm of the checks and balances machinery is not functioning as it should- demonstrating a 'crisis' in the 'constitutional design' of the US structure in practice.

But how did the US find itself in such a position- with an initially fearful and reactionary Congress, who later appeared to be incapacitated, an executive which sought to increasingly expand its constitutional scope of powers, and a judiciary which picked up the pieces and tried to complete the jigsaw puzzle again? In a 2005 article published by 'The Federalist Society for Law and Public Policy Studies', the

[132] *Ibid.*

[133] The USA Freedom Act (2015). Full title: 'The Uniting and Strengthening America by Fulfilling Rights and Ending Eavesdropping, Dragnet-Collection and Online Monitoring Act (2 June 2015, 114th Congress).

authors have argued that ambiguity in our understandings of 'enemy', 'war', 'crime' etc., proved so disconcerting that the executive response focused on 'centralised command and control'.[134] Wars have historically been between states, and outside the remit of criminal law. Yet, 09/11 challenged all of these presumptions- criminal acts committed on domestic soil by an enemy whom we could not easily identify or affiliate with a state. It has been argued that the executive responded proportionately in response to these new threats, in accordance with the 'independent substantive power' granted to the federal government under the Constitution, with regard to national security, as per *Brown* v *United States* (1814).[135] Article II of the US Constitution does indeed vest in the President, general executive power, and under Article II, S.2 the role as 'Commander in Chief of the Army and the Navy'-[136] but are such powers capable of being stretched whilst remaining constitutional, and within the confines of the overarching powers laid down in the Preamble? The aforementioned 2005 article summarises that:

'*Preserving both liberty and security rather than sacrificing one or the other requires wise and, therefore non-panicked policy.* '[137]

It is debateable whether we witnessed this with the passing of the USA PATRIOT Act, whether the violation of constitutional rights of US citizens was necessary and

[134] George Terwilliger, Theordore Cooperstein, Shawn Gunnarson, Daniel Blumenthal, Robert Parker, 'The War on Terrorism: Law Enforcement or National Security?' *The Federalist Society for Law and Public Policy Studies* (15 February 2005) Available at: http://www.fed-soc.org/publications/detail/the-war-on-terrorism-law-enforcement-or-national-security Last accessed July 2017.

[135] *Brown* v *United States* 12 U.S. [8 Cranch] 110, 125-126 (1814) (USA). Cited in: *Ibid.*

[136] The Constitution of the United States (1789), Article II. Available at: https://www.senate.gov/civics/constitution_item/constitution.htm Last accessed July 2017.

[137] George Terwilliger, Theordore Cooperstein, Shawn Gunnarson, Daniel Blumenthal, Robert Parker, 'The War on Terrorism: Law Enforcement or National Security?' *The Federalist Society for Law and Public Policy Studies* (15 February 2005) Available at: http://www.fed-soc.org/publications/detail/the-war-on-terrorism-law-enforcement-or-national-security Last accessed July 2017.

proportionate to the threat posed by terrorism, and whether the executive had the authority to make this determination.

Another area of US constitutional law which has gained the attention of the international community is that of Guantanamo Bay, which was used to detain those individuals suspected of links to terrorist organisations- many detainees were held for indefinite periods and without being charged or sitting trial. Faced with such a clear violation of international human rights law, the international community and US judiciary struggled to place the victims within a legal structure of protection to afford them some degree of legal protection, without which the detainees were rendered largely *'homo sacer'*. Although, to Former President George. W Bush, detainees were not on US soil (instead based in a leased naval base in Cuba) and thus were not capable of being afforded US constitutional legal protections- these individuals were held to still be covered within the ambit of the Geneva Conventions relating to prisoners of war. In the case of *Hamdan v Rumsfeld* (2006),[138] the courts proved capable of providing a check on the authority of President Bush through the insistence of a limit to his 'state of exception'. The Supreme Court in adjudicating whether Common Article 3 of the Geneva Conventions (1949) was applicable to detainees imprisoned at Guantanamo Bay, and thus whether the human rights protections therein would be applicable to the detainee, held in favour of international law and the rights of non-citizens detained by the US authorities. The Bush administration had previously argued that 'military necessity' warranted Mr Hamdan's trial by military commission, despite Congress refuting this- said argument was ultimately denied by the court:

'The Court's insistence on a limit to military necessity was a declaration both that the state of exception has certain characteristics on the basis of which any given

[138] *Hamdan v Rumsfeld*, 548 U.S. 557 (2006) (USA).

declaration of exception can be judged as accurate or inaccurate, and that the courts are capable of making that judgment.'[139]

The response of the Bush administration to this decision, can be seen most clearly in the statement of White House Counsellor Dan Bartlett, to *The Washington Post*:

'We strongly believe that terrorists picked up off the battlefield- who don't represent a nation, revel in killing the innocent, and refuse to wear uniforms- do not qualify for protections under Geneva…Five members of the Supreme Court disagreed. As the President said, we will comply with the ruling.'[140]

Pivotally, even where we can locate instances of extraconstitutional powers being exercised by President Bush, 'when the courts pushed back, the administration always yielded', and thus the constitutional order largely bounced back into shape.[141] As a result of President Bush's willingness to yield to the curbing of his executive power, we surely cannot argue that he wholly resembled Schmitt's notion of a 'sovereign exception'.

Even if we are to accept this argument, it does not change the fact that under his administration, executive powers under Article II of the US Constitution were broadened to new depths and subjected to limited scrutiny until they were forced to testify in court. It was only at this last stage of the constitutional system of checks and balances that the mechanism sprung into shape and restored a degree of

[139] Quinta Jurecic, 'Transition 2016: Donald Trump's State of Exception' (14 December 2016, Lawfare Blog) Available at: https://lawfareblog.com/donald-trumps-state-exception Last Accessed July 2017.
[140] Charles Baington, Michael Abramowitz, 'US Shifts Policy on Geneva Conventions' (12 July 2006, The Washington Post) Available at: http://www.washingtonpost.com/wp-dyn/content/article/2006/07/11/AR2006071100094.html Last accessed July 2017. Cited in: Quinta Jurecic, 'Transition 2016: Donald Trump's State of Exception' (14 December 2016, Lawfare Blog) Available at: https://lawfareblog.com/donald-trumps-state-exception Last accessed July 2017.
[141] *Ibid.*

'normalcy', albeit a fragmented one, as the legislation or policy would largely remain intact. It remains worrying how long it has often taken the courts to intervene, and how the initial abandonment of human rights protections and international law has been justified at the legislative stage through creative judicial interpretation and manipulation.

It has thus been noted that the 'design of the formal constitution' of the United States sets itself up for deadlock between the Executive and Legislature, although arguably this would be a category (2) crisis if correct.[142] Whittington describes it as 'operational gridlock' when presidential nominations are delayed by the Senate or outright rejected, or when controversial bills struggle to make their way through Congress.[143] Although in theory this is arguably merely a fully-functioning system of checks and balances, if the stalemate persists then it renders the system dysfunctional. This stalemate post-09/11 was not seemingly apparent between Congress and the Executive, perhaps because all branches were largely clouded by fear and a panic to react swiftly to an imminent threat.

In this way, it has been argued that President Bush's administration after 09/11 was willing to act right up to the very edges of the law, but not beyond it (once established by the courts that it is in fact beyond). Indeed, the extension of the scope of executive powers and their constitutionality were discussed in the case of *Rasul* v *Bush* (2004),[144] where the Supreme Court questioned the legality of President

[142] Keith Whittington, 'Yet Another Constitutional Crisis?' William and Mary Law Review (2002) Vol. 43(5) p. 2106 Available at: http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1498&context=wmlr Last accessed July 2017.
[143] *Ibid.* p. 2106.
[144] *Rasul* v *Bush* 124 S. Ct 2686 (2004) (USA). Cited in: Michael Kirby, 'Terrorism: The International Response of the Courts (The Institute for Advanced Study Branigin Lecture) *Indiana Journal of Global Legal Studies* (Winter 2005) Vol. 12(1) p. 344. Available at:

George W. Bush's power to establish Guantanamo Bay and restrict the rights of habeas corpus of the detainees held there. The Court analysed the law which supposedly granted the President the power to do this, namely the aforementioned Authorisation for the Use of Military Force (2001). The Supreme Court held against the executive, and in favour of the protection of the human rights of non-citizen detainees and the rule of law, even in the face of security threats and exceptionalism. Justice Stephens stated, quoting his previous judgement in *Padilla* (2010): [145]

'At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber…For if this nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny."[146]

Kenneth Roth, drawing upon the case of *Padilla* (2010), explains how the Bush administration used the rhetoric of war very effectively to grant itself the legitimacy to implement exceptionalism on a vast scale. By characterising the situation as one of 'war', it effectively allowed for the government to detain or kill suspects without due process of a trial. If a wartime setting was indeed accurate, then:

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http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1299&context=ijgls Last accessed July 2017.

[145] *Padilla* v *Kentucky*, 124 S. Ct at 2735 (2010) (USA).

[146] *Padilla* v *Kentucky*, 124 S. Ct at 2735 (2010) (Justice Stephens) (USA). Cited in: Michael Kirby, 'Terrorism: The International Response of the Courts (The Institute for Advanced Study Branigin Lecture) *Indiana Journal of Global Legal Studies* (Winter 2005) Vol. 12(1) p. 335. Available at: http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1299&context=ijgls Last accessed July 2017.

'Padilla could have been gunned down as he stepped off his plane at O'Hare, and al-Marri as he left his home in Peoria. That, after all, is what it means to be a combatant in a time of war.'[147]

The reason we did not see such actions was on account of the fact that the supposed 'War on Terror' is a legal fiction- the label may be attached, but the implications of characterising it as a 'war' have not followed suit.

Referring back to the activities at Guantanamo Bay, in 2016 Former President Obama transferred 15 detainees to the United Arab Emirates, with 31 detainees remaining in the detention facility in Cuba.[148] Constitutional debates over whether the US Constitution or international law are capable of protecting them from human rights abuses, including inhuman and degrading treatment (protected by both the 8th Amendment to the US Constitution and the ICCPR) and due process protections (5th Amendment)[149] remain ongoing. Thus, Guantanamo Bay continues to provide an interesting example of how the US grapples with the tensions between national security and human rights, and this has:

'*sparked many important constitutional debates: from procedural issues concerning the length of time detainees have been held without charge- over 14 years in some cases- and civil rights concerns for detainee treatment, to conflicts about the executive, legislative and judicial branches over…policy.'*[150]

[147] Kenneth Roth (2004) pp. 2-4. Cited in: Peter L. Hickman II, 'The Lore of the Laws of War: Textual Constructions of Archetypal Identities in the War on Terrorism' (Dissertation, Arizona State University, ProQuest, April 2014) p.55.
[148] Lana Ulrich, (National Constitution Centre), 'The Constitutional Debates over the Military Prison at Guantanamo Bay' (9 September 2016) Available at: https://constitutioncenter.org/blog/the-constitutional-debates-over-the-military-prison-at-guantanamo-bay Last accessed July 2017.
[149] *Ibid.*
[150] *Ibid.*

What remains clear is that Guantanamo Bay 'remains a constitutional and political enigma',[151] 'an archipelago of exception',[152] a perpetual space for the confinement of *'homo sacer'* detainees- arguably the facility embodies the perpetual state of terror and exceptionalism within which the US finds itself. However, the Supreme Court of the US has shown that, when challenged, it will ensure that such detention facilities do not prove to be a 'legal blackhole'. [153]

However, how effective will such checks and balances prove under the administration of President Trump, the alleged 'Schmittian nightmare',[154] who is blindly vaulting over the hurdles of law, normalcy and order. It was largely unsurprising to many, that he has proved ignorant of the details and fine-print of the US Constitution, but his disregard of 'the document's significance and power as the bedrock of democracy and the rule of law' has left lawyers and politicians baffled.[155]

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[151] *Ibid.*

[152] Weizman (2005) Cited in: Peter L. Hickman II, 'The Lore of the Laws of War: Textual Constructions of Archetypal Identities in the War on Terrorism' (Dissertation, Arizona State University, ProQuest, April 2014) p. 67.

[153] Michael Kirby, 'Terrorism: The International Response of the Courts (The Institute for Advanced Study Branigin Lecture) *Indiana Journal of Global Legal Studies* (Winter 2005) Vol. 12(1) p. 336. Available at: http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1299&context=ijgls Last accessed July 2017.

[154] Quinta Jurecic, 'Transition 2016: Donald Trump's State of Exception' (14 December 2016, Lawfare Blog) Available at: https://lawfareblog.com/donald-trumps-state-exception Last accessed July 2017.

[155] Orin Kerr, 'Trump wants to protect Article XII of the Constitution' (The Washington Post, 7 July 2016) Available at: https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/07/07/trump-wants-to-protect-article-xii-of-the-constitution/?utm_term=.38d47dab7a03 Last accessed July 2017. Cited in: Quinta Jurecic, 'Transition 2016: Donald Trump's State of Exception' (14 December 2016, Lawfare Blog) Available at: https://lawfareblog.com/donald-trumps-state-exception Last accessed July 2017.

Having relished in the stability and continuity of the President Obama administration, in terms of his commitment to human rights and freedoms, the subsequent inauguration of President Trump in 2017 shocked the world. In a political battle between the Democrat candidate, Hillary Clinton and Republican, Donald Trump- to much of the world's surprise, the latter declared victory in the presidential election of 2016. It would be impossible to cover within this paper all of the legal issues which have resulted from this election, however, I will outline numerous constitutionally- contentious events in order to aid our contextual understanding. Firstly, allegations have surfaced over Russian involvement in, or hacking of, the US election to ensure victory for President Trump. On 10 April 2017, a Russian computer programmer was arrested in Spain in accordance with a US international arrest warrant, on suspicion of involvement with said hacking.[156]

It is also worthwhile to question the possible reasoning behind such a shift in the political opinion of American voters from previously electing Democrat President Obama, to electing the far-right Republican President Trump. Many political commentators have highlighted the latter's hard-line election campaign stance on security and combating terrorism as the reasoning behind such a change towards nationalistic sentiment. If it could be proven that US citizens actually desired electing a Schmittian authoritarian leader, we would be forced to question whether his resulting extraconstitutional actions were in fact within the remit of the acceptable mandate granted to him by the electorate. In order to make such a determination, we would need to strip the state free from fear and propaganda, and objectively analyse whether the citizens did indeed intend to elect such a leader and grant him such broad executive powers?

[156] 'Russian Computer Programmer Held in Spain under US Warrant', (10 April 2017, The Guardian News) Available at: https://www.theguardian.com/world/2017/apr/10/russian-computer-programmer-held-in-spain-under-us-warrant Last accessed July 2017.

In the image of President Trump, we again see 'the face of the wolf',[157] although this time the face is more realistic and threatening than ever: the ultimate 'Schmittian revival'?[158] I assert that what we are witnessing is a newfound fear of the latest 'unknown' in President Trump. But we must be wary not to confuse his ignorance of, and lack of regard for, the rule of law with him having the formal authority to actually fracture it beyond repair. After all, fear ultimately breeds fear.

President Trump's relationship with the judiciary has proven tense since his inauguration in early 2017, with the former often questioning the authority and legitimacy of US judges.[159] Indeed, it has been remarked by Democrat Senator Patrick Leahy, who sits on the Senate Judiciary Committee that:

> *'The President's hostility toward the rule of law is not just embarrassing, it is dangerous…he seems intent on precipitating a constitutional crisis'*[160]

Although Article III, S.2 of the US Constitution grants the Judiciary 'the judicial power…[extending] to all cases, in law and equity arising under this Constitution, the laws of the United States and Treaties made…',[161] and thus a President cannot

[157] Quinta Jurecic, 'Transition 2016: Donald Trump's State of Exception' (14 December 2016, Lawfare Blog) Available at: https://lawfareblog.com/donald-trumps-state-exception Last accessed July 2017.
[158] *Ibid.*
[159] 'Taking on Trump: Is the US facing a constitutional crisis?' (6 February 2017, BBC News) Available at: http://www.bbc.com/news/world-us-canada-38881119 Last accessed July 2017.
[160] Senator Patrick Leahy, 'Comment on Partisan Attacks on the Federal Judiciary' (4 February 2017) Available at: https://www.leahy.senate.gov/press/comment-on-partisan-attacks-on-the-federal-judiciary Last accessed July 2017.
[161] The Constitution of the United States (1789), Article III (2). Available at: https://www.senate.gov/civics/constitution_item/constitution.htm Last accessed July 2017. Cited in: Taking On Trump: Is the US facing a constitutional crisis?' (6 February 2017, BBC News) Available at: http://www.bbc.com/news/world-us-canada-38881119 Last accessed July 2017.

bypass their scrutiny, the courts must wait for a case to be brought before them before they are able to judge. Thus, relying heavily on civil society to do so.

But aside from the ordinary channels of enacting legislation, the President also holds a special power to pass Executive Orders, which historically have often been widely-used during times of war or national emergency. Although the US Constitution makes no explicit reference to granting the executive the power to enact Executive Orders, it has commonly been interpreted into the meaning of 'Executive Power' in Article II, S.1, Clause 1, coupled with the interpretation of Article II, S.3, Clause 5- namely to 'take care that the laws be faithfully executed'.[162] President Trump's administration has issued 25 Executive Orders, from his inauguration to the 21 April 2017.[163] These are legally-binding Executive Orders, capable of being scrutinised in accordance with judicial review, but which bypass the ordinary processes of legislative scrutiny and debate. Importantly, Executive Orders can only be enacted within the confines of the Constitution- but even the constitutional mandate upon which such a power is derived is largely ambiguous.

President Trump's most controversial Executive Order to date has been Executive Order 13769, titled 'Protecting the Nation from Foreign Terrorist Entry into the United States', which was signed into legal effect on 27 January 2017.[164] The Order enforced a federal ban on the entry of individuals into the US, who had travelled

[162] The Constitution of the United States (1789), Article II (1). Available at: https://www.senate.gov/civics/constitution_item/constitution.htm Last accessed July 2017.
[163] 'List of Trumps' Executive Orders' (28 April 2017, FOX News) Available at: http://www.foxnews.com/politics/2017/04/20/list-trumps-executive-orders.html Last accessed July 2017.
[164] Executive Order 13769 82 FR 8977 (United States, 27 January 2017); Subsequent Executive Order 13780 82 FR 13209 (United Sates, 6 March 2017) Available at: https://www.federalregister.gov/executive-orders/donald-trump/2017 Last accessed July 2017.

from 7, predominantly Muslim, nations. Thus, it was coined 'The Muslim Travel Ban'.[165]

'*The Order imposes a 90-day suspension on entry into the United States by persons from 7 countries: Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen. It suspends for 120 days the US Refugee Admissions Program, the means by which refugees are identifiable and admitted to the United States, with the stated intention of adding additional vetting procedures, excluding citizens of certain nations…it suspends indefinitely the entrance of Syrian refugees and caps the number of all refugees to be admitted in 2017 at 50,000.*'[166]

In response to this measure, the judiciary mobilised swiftly in responding to the needs of people who had been detained in airports, returned to their country of origin etc., initially, a federal court granted an 'emergency stay' of the Order and later rendered it unconstitutional. The Order was claimed to be necessary in order to combat terrorism, but in specifying largely Muslim countries, ironically targeting those with whom the US 'does not have a substantial economic relationship',[167] the legality of the Order was questioned on the basis of discrimination in targeting a religious group or nationality.[168] On the basis of the US Constitution,[169] it was

[165] Maggie Baldridge, 'Executive Orders in President Trump's first 10 days' (National Constitution Centre, 4 February 2017) Available at: https://constitutioncenter.org/blog/executive-orders-in-president-trumps-first-10-days/ Last accessed July 2017.

[166] Kermit Roosevelt III, (Professor of Constitutional Law at The University of Pennsylvania Law School) 'Executive Order 13769: America at its Best and its Worst' (1 February 2017, Foreign Policy Research Institute) Available at: http://www.fpri.org/article/2017/02/executive-order-13769-america-best-worst/ Last accessed July 2017.

[167] *Ibid.*

[168] Immigration and Naturalization Act 8 U.S.C. S.1152 (United States).

[169] The Constitution of the United States (1789), 1st Amendment; 5th Amendment. Available at: https://www.senate.gov/civics/constitution_item/constitution.htm Last accessed July 2017.

likewise argued that the Order proved to be religiously biased, in preferring Christians to Muslims. Although creative legislative wording rendered the Orders largely untouchable legally, when coupled with the political statements made by President Trump and interviews, campaign statements etc., we are able to see his clear motives behind such a travel ban. Having faced legal scrutiny in court, President Trump fired the acting Attorney General for declaring her doubts about the Order's legality, and a new Executive Order was drawn up to serve as a replacement. But Executive Order 13769 has shocked lawyers and politicians across the world for being:

'*Pointlessly cruel. In its form, it is amateurish: poorly-drafted, produced without consultation with the agencies charged with its enforcement and sprung upon them as a surprise. Even if it had been sensible, there were bound to be mistakes in implementation…a five-year-old American boy was handcuffed and detained for hours, separated from his family. White House Press Secretary Sean Spicer, ignoring the American citizenship, justified the detention afterwards on the grounds that five-year old boys might well be security threats.'*[170]

It is this disregard for the law, truth and justice which renders President Trump a volatile Schmittian-creation, capable of pushing the Constitution to its very limits- the only test remaining will be whether a civil society and judicial backlash will ensure that the executive remains subject to constraints.

'What we can be hopeful about is the response of the courts, which thus far have treated the challenges to the Executive Order with the seriousness they deserve, and

[170] Kermit Roosevelt III, (Professor of Constitutional Law at The University of Pennsylvania Law School) 'Executive Order 13769: America at its Best and its Worst' (1 February 2017, Foreign Policy Research Institute) Available at: http://www.fpri.org/article/2017/02/executive-order-13769-america-best-worst/ Last accessed July 2017.

of the American people who have gone to airports to demonstrate their support for refugees. They show us a better understanding of America and its relation to the world, the understanding that hurting innocent people doesn't make us safer and shouldn't make us feel better."[171]

Ultimately, the rule of law and constitutional protections of human rights are difficult to dismantle within one presidential term, especially in a state where such principles are enshrined in written legal documents and have been firmly-established and entrenched. This is not the question at hand, however, our primary concern is preventing the destructive effects of a 'crisis', no matter how marginal or transient, from materialising and threatening the human rights of those on US soil who are dependent on these protections. If we merely await the end of the presidential term without intervening, how many human rights and constitutional norms will face such an attack that they erode in the meantime?

As an exercise in hypothetical thought experiments, let us imagine that the events of 09/11 had shaken a different state, one with a less-entrenched constitutional mandate of human rights protections. Had that been the case, the 'War on Terror' might have been conducted with far less respect for constitutional law. Can we take this risk in the future and await the attack of a constitutionally-weaker state? On the other hand, the international rhetoric of the 'War on Terror' could have been quite unrecognisable and arguably preferable, had the attack of 09/11 taken place elsewhere. The heightened fear and widespread propaganda produced by a superpower would probably have been largely shaken-off had it instead been voiced by a less-powerful state, more willing to accept their victimhood. Thus, the ricochet effect of anti-terror sentiment may not have occurred and normalcy returned sooner-

[171] *Ibid.*

for many states the reaction of a corresponding 'state of exception' would arguably not have materialised in the first place. This perhaps goes some way to demonstrate how the actions of a superpower affected the actions and policies of states and the international community as a whole, and largely continue to do so 16 years on. Thus, we must not allow their actions to appear unchecked and above the scrutiny of both their own domestic law and international law- it sets a dangerous precedent to other states. Pivotally, we must be proactive in preventing constitutional crises, irrespective of what form they take and where, and must not merely wait for a natural return to normalcy- this waiting game, as we saw previously in our rebuttal of Charlie Chaplin's lamentations, is too costly to play.

As previously remarked, 09/11 struck one of the most constitutionally-impenetrable states in the world; the United States is widely-deemed to be the bastion of democracy and constitutional rights protection. The US case study thus teaches us an important lesson- namely, that a constitutional legal doctrine, a coherent body of human rights protections is necessary for all states- as often it is the only tool remaining when in times of exceptionalism, tainted by chaos and disorder, a constitution is the only thing still standing. This perhaps goes some way to evidence our need for an enforceable international constitutional law, to act as the guardian of constitutional values, for those states who have failed to construct a domestic model of their own, or those states whose constitutional structure is failing.

Unless authoritarianism in the US takes on a wholly new form and legal basis, the US Constitution and the protections therein will for the most part likely ensure a return to normalcy eventually. However, as previously asserted, we cannot settle for such a waiting game in the interim period; standing at the side-lines and watching the erosion of constitutional human rights is an unjustifiable approach, as is merely attempting to mitigate the extreme effects of exceptionalism and constitutional yo-

yoing. These are simply not solutions to the problems we are confronted with- they are the products of apathy. Instead, having located the deficiencies in the legislative process, we can thus decipher which void an international constitutional mechanism must fill. Although we seemingly can rely on the US courts to provide eventual redress for the injustices of such unconstitutional legislation, these courts are often over-worked and flooded with claims during periods of exceptionalism- thus, we must be preventative in our mandate on the international level. If we are capable of establishing a system whereby proposed domestic legislation is reviewed by an international judicial body during exceptionalism, recommendations made and states forced to comply with their amendments, then surely this would lift a burden from the US courts and allow them the space to adjudicate only those cases which have fallen through a far smaller net.

If the case study of the United States has taught us nothing more, let us remember the important functions of the judiciary and civil society in retaining the core of the constitutional structure. We must refrain from being fearful and we must heed no ground to authoritarianism in whatever form it takes. In May 2017, in the wake of President Trump's firing of former FBI Director James Comey over the investigation of a former National Security Advisor, Michael Flynn- talks of possible impeachment have surfaced in Congress, for potentially obstructing this investigation.[172] We must remember, as Quinta Jurecic so pithily states:

'The Wolf's Bark is worse than his Bite'.[173]

[172] Mahita Gajanan, 'Texas Democrat Calls for President 'Trump's Impeachment on House Floor' (17 May 2017, TIME) Available at: http://time.com/4782225/al-green-congress-donald-trump-impeachment/ Last accessed July 2017.

[173] Quinta Jurecic, 'Transition 2016: Donald Trump's State of Exception' (14 December 2016, Lawfare Blog) Available at: https://lawfareblog.com/donald-trumps-state-exception Last accessed July 2017.

B. Australia: Tackling 'Hyper-Legislation'

*'Something is happening to **Australia's democracy**…**with little debate**, and even less contestation, **civil liberties and safeguards** developed over hundreds of years are being **whittled away, constrained**, or **removed** altogether.'*[174]

Amidst the backdrop of a nation which has strived for toleration and multiculturalism in its culture and recent history, former Prime Minister Tony Abbott stated in 2014 that 'the delicate balance between freedom and security may have to shift.'[175] This change in Australian political dynamics and priorities was perhaps most surprising because 'domestic' terrorism has arguably not posed a serious threat to the national security of Australia- [176] a total of 113 Australian citizens had been killed on account of terrorism between 1978 and 2014. [177] Commentators have drawn attention to the fact that the most dangerous place for Australians, in terms of terrorism, is actually Indonesia and not Australian soil. In 2009 the Jakarta Bombing killed 2 Australians; 4 were killed in the Bali attack of 2005 and 88 in the Juta bombings of 2002. In fact, 'there has been no domestic

[174] Ben Eltham, 'Abbott's Anti-Terror Laws are the Real Danger to Australia' (23 September 2014) Available at: https://newmatilda.com/2014/09/23/abbotts-anti-terror-laws-are-real-danger-australia/ Last accessed July 2017.
[175] *Ibid.*
[176] Since this time, numerous terrorism-related attacks have occurred, for more discussion *please see*: Michelle Innis, 'Terrorism Cited in Killing in Australia' (6 October 2015, The New York Times) Available at: https://www.nytimes.com/2015/10/07/world/asia/parramatta-australia-shooting-terrorism-cited.html?_r=1 Last accessed July 2017.
[177] Ben Eltham, 'Abbott's Anti-Terror Laws are the Real Danger to Australia' (23 September 2014) Available at: https://newmatilda.com/2014/09/23/abbotts-anti-terror-laws-are-real-danger-australia/ Last accessed July 2017.

terrorism incident on our home soil since the Hilton bombing in 1978.'[178] Despite these statistics and a clearly-low threat level to Australians on their home soil, then Prime Minister Abbott '[flipped] the switch to terror so easily.'[179]

The first materialised threats to Australian citizens were seen in 2014 with both the 'Endeavour Hills Stabbings' and the 'Sydney Hostage Crisis'. The former concerned an 18-year-old man, who was shot and killed outside a police station after stabbing two police officers who were working on counter-terrorism operations- he was found to be carrying knives and an Islamic State flag.[180] The latter incident occurred on 15 December 2014, when a Muslim Sheikh held 17 people hostage inside a café in Sydney, resulting in the death of 2 hostages, the death of the perpetrator and a further 4 injured civilians.[181] This hostage crisis proved contentious, as it was initially not classified as having terrorist links, despite hostages being asked to hold an ISIS flag in the café window, and thus counter-terrorism task forces were not involved with the hostage situation until later in the incident. Many commentators have alluded to the idea that the perpetrator was actually acting in his own interests, and did not have a terrorist affiliation, negating assumptions that the attack had religious links, and drawing upon the mental state of the aforementioned to locate the intentions behind his actions.[182] Although the

[178] *Ibid.*
[179] *Ibid.*
[180] John Silvester, 'Melbourne Terror Shooting: Numan Haider Planned to Behead Victoria Police Officers, Drape Bodies in IS Flag', (The Sydney Morning Herald, 24 September 2014) Available at: http://www.smh.com.au/victoria/melbourne-terror-shooting-numan-haider-planned-to-behead-victoria-police-officers-drape-bodies-in-is-flag-20140924-10lb4i.html Last accessed July 2017.
[181] 'A Nightmare Comes True', (The Economist, Print Ed., 17 December 2014) Available at: http://www.economist.com/news/asia/21636793-caf-siege-will-spark-fresh-debate-about-vulnerability-terrorism-nightmare-comes-true Last accessed July 2017.
[182] Rick Feneley, 'Sydney Siege: Man Haron Monis "humanitarian" and terrorist' (The Sydney Morning Herald, 20 December 2014) Available at:

'Endeavour Hills Stabbings' could be said to easily come within the remit of 'terrorism', it is arguable that the latter was moulded into conforming to the broad definition of 'terrorism' in order to justify a backlash of counter-terrorism measures by the government. It also provides a sound example of the difficulty in deciphering how we can understand crimes of 'terrorism', and how this new category of criminal act is capable of being interpreted. Since 2014, numerous terror plots have allegedly been discovered and prevented, alongside others which have unfortunately materialised into criminal attacks with casualties and victims. What remains surprising, however, is the sheer number of counter-terrorism measures which were promulgated by the government prior to these attacks taking place in 2014. It certainly seems as though the state prepared itself, in the wake of 09/11, for terrorist attacks, and as the state cracked down upon human rights and liberties, a fearful setting took hold and inevitably within such a setting of disenfranchisement and categorisation of citizens, terrorist attacks occurred.

Prior to the aforementioned 'terror' attacks on Australian soil, the media was supplied with terror images and fabricated stories to instil fear in the Australian people, which allowed then, Prime Minister Abbott more room to manoeuvre a controversial Anti-Terror Bill through Parliament, which has since been enacted into law. The National Security Legislation Amendment Bill (No 1) (2014),[183] grants wider surveillance powers, criminalises the reporting of intelligence links in order to prevent whistle-blowing situations and even permits the use of force in interviews.

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http://www.smh.com.au/nsw/sydney-siege-man-haron-monis-humanitarian-and-terrorist-20141219-12ajn5.html Last accessed July 2017.

[183] National Security Legislation Amendment Bill (No 1) (2014) (Australia) Available at: http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s969 Last accessed July 2017.

In response to the Bill, the Australian Human Rights Commission conducted an inquiry into the proposed legislation, alleging potential violations of Articles 17 (Right to Privacy) and 19 (Freedom of Expression), of the ICCPR (International Covenant on Civil and Political Rights 1966),[184] and suggested recommendations. Despite such efforts, the Bill was passed into law on 1 October 2014, and subsequent anti-terror legislation has also been passed to date.[185]

Importantly, such legislation pre-dates the aforementioned 'terror' attacks in 2014, and thus we are forced to posit the question of how necessary and proportionate the government's response to 09/11 was in terms of the passing of 'draconian anti-terror laws',[186] which infringed upon the rights of all Australian citizens, without a substantiated threat.

Indeed, Williams notes the significance of the sheer number of anti-terror laws which have been enacted since 09/11, as 'the amount of legislative activity in this area…reflects the level of attention given by lawmakers and government agencies to the topic.'[187] Interestingly, also, is the pace at which they were passed. Williams counted the number of anti-terror related laws and regulations which were enacted between 11 September 2001 and 11 September 2011 in Australia, according to his

[184] Australian Human Rights Commission, 'Inquiry into the National Security Legislation Amendment Bill (No 1) 2014' (21 August 2014) Available at: https://www.humanrights.gov.au/sites/default/files/14.08.21%20NationalSecurityAmendmentBillNo_1%20Submission_Final.pdf Last accessed July 2017.

[185] For further discussion *please see*: George Williams, 'Anti-Terror Laws and Australia' (University of New South Wales) Available at: http://www.law.unsw.edu.au/news-events/anti-terror-laws-and-australia-%E2%80%93-professor-george-williams Last accessed July 2017.

[186] Greg Barns, 'Welcome to Authoritarian Australia, where more Anti-Terror Laws won't keep us safe', (The Guardian, 13 October 2015) Available at: https://www.theguardian.com/commentisfree/2015/oct/13/welcome-to-authoritarian-australia-where-more-anti-terror-laws-wont-keep-us-safe Last accessed July 2017.

[187] George Williams, 'A Decade of Australian Anti-Terror Laws', *Melbourne University Law Review* Vol. 35 (2011) p.1140 Available at: http://www.mulr.com.au/issues/35_3/35_3_13.pdf Last accessed July 2017.

criteria, and arrived at 54.[188] However, this is not the most disconcerting revelation he came across- he also constructed an average enactment per year, and his findings were most worrisome. From 11 September 2001 until November 2007, the federal Parliament under the Howard coalition enacted 48 of the aforementioned laws, which amounted to 7.7 laws a year, and thus an anti-terror enactment every 6.7 weeks.[189] Under the succeeding administration of Rudd and Gillard from 24 November 2007 until 11 September 2011, only 6 anti-terror laws were passed, giving an average enactment every 32.8 weeks.[190] One such example of post-09/11 legislation includes the passing of the Anti-Terrorism Act (No 2) (2005),[191] which was passed in direct response to the London terrorist bombings of July 2005: 'attention was drawn to the London attacks, as well as to earlier bombings in Spain, Bali and the United States, throughout the course of its enactment.'[192]

Professor of Law at the University of Toronto, Kent Roach, likewise commented on Australia's 'hyper-legislation' as surpassing the United Kingdom, Canada and the USA in terms of the sheer volume of anti-terrorism legislation.[193] This surge in legislative enactment was coupled with 'a rhetoric of urgency and exceptionalism

[188] *Ibid.* p.1144.

[189] Howard Government was in power between 11 September 2001 – 24 November 2007 for a total of 323 weeks, equivalent to 6.21 years. 48 laws were passed during this period, which gives an average of 7.7 laws a year. Cited in George Williams, 'A Decade of Australian Anti-Terror Laws', *Melbourne University Law Review* Vol. 35 (2011) p. 1145. Available at: http://www.mulr.com.au/issues/35_3/35_3_13.pdf Last accessed July 2017.

[190] The Rudd and Gillard Government was in power between 24 November 2007 – 11 September 2011 for 197 weeks, giving an average of 1.6 laws per year. Cited in *Ibid.* p.1145.

[191] Anti-Terrorism Act (No 2) (2005) (Australia).

[192] Rebecca Ananian-Welsh, George Williams, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia' *Melbourne University Law Review* Vol. 38 (2) (2014) p. 366.

[193] Kent Roach, *The 9/11 Effect* (Cambridge University Press, 2011) p. 309 Cited in: 'Pushing the Limits' (The Economist, 15 October 2014) Available at: http://www.economist.com/blogs/banyan/2014/10/australia-and-terrorism Last accessed July 2017.

that enabled the laws' speedy enactment.'[194] For example, the aforementioned 2005 Act was subjected to little scrutiny, as the bill was passed to Parliament on 3 November 2005 with the attached memo that the Attorney General wanted the law to be enacted before Christmas. [195] Resultantly, 'the Senate Legal and Constitutional Legislation Committee conducted an inquiry into the Bill, however this inquiry allowed only a 6-day period of calling for submissions, 3 days of hearings and 10 days to prepare the final report.'[196]

Although the passing of anti-terror laws has slowed since, it is interesting to see how in the wake of 09/11, mass international hysteria, chaos and fear brought about a simultaneous mass enactment of anti-terror laws which normalised exceptionalism and eroded the human rights situation of Australia indefinitely.

It has been alleged that the vast body of anti-terror legislation has granted the Australian Security Intelligence Organisation (ASIO) huge powers over Australian citizens, who are themselves not actually suspected of any particular crime- for example, such individuals are capable of being detained and questioned for up to seven days, control orders can also be invoked to keep someone under house arrest for up to one year and search powers of private property are largely boundless and require no warrant.[197] Such practices 'demonstrate the new legal reality after the events of 11 September 2001.' [198] Indeed, anti-terror legislation has been promulgated hand-in-hand with an increasing number of control orders, which are

[194] Rebecca Ananian-Welsh, George Williams, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia' *Melbourne University Law Review* Vol. 38 (2) (2014) p. 365.
[195] *Ibid.* p. 366.
[196] *Ibid.* p. 367.
[197] George Williams, 'A Decade of Australian Anti-Terror Laws', Melbourne University Law Review Vol. 35 (2011) p. 1137 Available at: http://www.mulr.com.au/issues/35_3/35_3_13.pdf Last accessed July 2017.
[198] *Ibid.* p. 1137.

essentially civil orders which further restrict human rights and freedoms. In this way, 'anti-terror strategies are now being copied in other areas of the law.'[199] Although it has been argued that Australian control orders were enacted to mirror those of the United Kingdom- the latter benefits from the balancing act provided by The Human Rights Act 1998, whilst the former has not devised such a system of protection.

The translation of such anti-terror legislation into legal reality has brought about 37 charges and 25 convictions of all men, whom were given heavy prison sentences for their crimes.[200] These charges were notably not in respect of actual terror attacks, but instead offences in connection to potential terror attacks. With Australia's preventative stance on anti-terror laws, they often criminalise activities which are at times loosely-connected with terrorist practices or training, without the need for the terrorist attack to have materialised or for clear evidence of criminal intent.

In the trial of five individuals from Sydney, charged with terrorism offences in February 2010, Justice Whealy remarked:

> '*The broad purpose of the creation of offences of [this] kind…is to prevent the emergence of circumstances which may render more likely the carrying out of a serious terrorist act…the legislation is designed to bite early, long before the*

[199] Use of control order powers in the *Serious and Organised Crime (Control) Act* (2008), declared partly invalid by the High Court in *South Australia v Totani (2010) 242 CLR 1*. *Cited in* George Williams, 'A Decade of Australian Anti-Terror Laws', *Melbourne University Law Review* Vol. 35 (2011) p. 1138 Available at: http://www.mulr.com.au/issues/35_3/35_3_13.pdf Last accessed July 2017.

[200] *Ibid.* p. 1153.For a detailed exploration of the 37 men charged with federal terrorism offences, *please see* Nicola McGarrity, '"Testing" our Counter-Terrorism Laws: The Prosecution of Individuals for Terrorism Offences in Australia' (2010) Vol. 34 *Criminal Law Journal* 92.

preparatory acts mature into circumstances of deadly or dangerous consequence for the community.'[201]

The offences in the present case related to the purchasing of ammunition, chemicals and laboratory equipment, which when coupled with their possession of propaganda relating to extremism was deemed sufficient to evidence their supposed guilt of intending to carry out terrorist activities. Indeed, their 'collective disdain for the Australian government and their intolerant animosity towards members of the community' rendered it 'inevitable' that they would willingly take human life.[202] It is such a predictive and presumptuous approach to intention and guilt in anti-terror laws, and mimicked by the courts, which defies the constitutional doctrine of the presumption of innocence.

The case of Mohamed Haneef, an Indian doctor working in Australia, who was arrested in July 2007 and detained for 12 days before being charged for terror-related offences, provides a case in point of Australia's approach to terrorism.[203] Mr Haneef was detained and charged on account of his link to a terror suspect, his second cousin, who had allegedly been involved in an attempted terrorist attack on Glasgow Airport in the United Kingdom. The basis for Mr Haneef's involvement rested on the passing of his mobile phone SIM card to that suspect. Charges were later dropped, and an undisclosed amount of compensation paid to the accused from

[201] *R* v *Elomar* (2010) 264 ALR 759, 779 [79] cited in: George Williams, 'A Decade of Australian Anti-Terror Laws', *Melbourne University Law Review* Vol. 35 (2011) p. 1154. Available at: http://www.mulr.com.au/issues/35_3/35_3_13.pdf Last accessed July 2017.
[202] *Ibid.* p. 1155.
[203] Mr Haneef was charged under Criminal Code s 102.7(2). *Please see*: Michael Head, 'The Haneef Inquiry: Some Unanswered Questions' (2009) 2 *Journal of the Australasian Law Teachers Association* 99; Mark Rix, 'The Show Must Go on: The Drama of Dr Mohamed Haneef and the Theatre of Counter-Terrorism' in Andrew Lynch, Nicola McGarrity and George Williams (eds.) *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) p.199.

the Australian government.[204] The Clarke Inquiry which followed found that there was 'no evidence that [Haneef] was associated with or had foreknowledge of the terrorist events,'[205] and that although there was sufficient suspicion to warrant the initial arrest, there was not a 'reasonable ground' for his detention beyond seven days. In response to this criticism and media speculation, the Australian government amended the relevant legislation, *Crimes Act* 1914,[206] to stipulate more clearly the provisions regarding delays and timings.[207] However, this detention of Mr Haneef without sufficient evidence nor suspicion, and with no checks on time constraints has raised human rights concerns for those accused of terror-related offences. The system of anti-terrorism measures in Australia appears to take the stance of an inverted constitutional doctrine- namely a presumption of guilt, before found innocent.

Pivotally, what sets the Australian situation apart from the vast number of states implementing anti-terror laws post-09/11, is the fact that Australia does not have a national bill or charter of rights, and thus this renders it:

[204] 'Haneef Compensation "About $1 m"', (The Sydney Herald, 22 December 2010*)* Cited in: George Williams, 'A Decade of Australian Anti-Terror Laws', *Melbourne University Law Review* Vol. 35 (2011) p. 1155. Available at: http://www.mulr.com.au/issues/35_3/35_3_13.pdf Last accessed July 2017.
[205] M J Clarke, *Report of the Inquiry into the Case of Dr Mohamed Haneef* (2008) Vol. 1 (vii) Cited in: *R* v *Elomar* (2010) 264 lr 759, 779 [79] cited in *Ibid.*
[206] Crimes Act (1914) (Australia).
[207]George Williams, 'A Decade of Australian Anti-Terror Laws', *Melbourne University Law Review* Vol. 35 (2011) p.1156. Available at: http://www.mulr.com.au/issues/35_3/35_3_13.pdf Last accessed July 2017.

'Impossible to challenge under Australia's constitution the country's anti-terror laws for their impact on free speech and other liberties. Limits in Australia depend on political leaders' judgements.'[208]

Professor Williams explores Australian anti-terror legislation in his 2011 article, drawing on the differences between WW1 and WW2 legal measures in comparison to those enacted post-09/11. He notes that the former had a 'more definite duration' and 'cease[d] to operate after the conflict ended', whereas the latter post-09/11 situation is tainted by a 'character of permanence'.[209] Although some other states benefit from at least some reassurance, in their anti-terror laws including a 'sunset clause', which allows them to draw to a close after a certain period of time has elapsed, most have a mandate which is wholly indefinite, as we see with Australia.[210] As such, we cannot merely turn a blind-eye to the implications of such a long-term influence on all matters of precedent, expectations and political practices. It largely normalises the prioritisation of security over human rights protection and this is a slippery-slope. Indeed, from the outset, anti-terror legislation was framed as temporary in nature, to grapple with a temporary threat- but 'it is now clear that Australia's anti-terror laws can no longer be cast as a transient, short-term legal response.'[211] The infinite nature of this exceptionalism is perhaps best expressed in the 2010 statement by the Australian government in stating:

[208] 'Pushing the Limits' (The Economist, 15 October 2014) Available at: http://www.economist.com/blogs/banyan/2014/10/australia-and-terrorism Last accessed July 2017.
[209] George Williams, 'A Decade of Australian Anti-Terror Laws', *Melbourne University Law Review* Vol. 35 (2011) p. 1138 Available at: http://www.mulr.com.au/issues/35_3/35_3_13.pdf Last accessed July 2017.
[210] *Ibid*. p.1138.
[211] *Ibid.* p. 1137.

'[the] threat of terrorism to Australia is real and enduring. It has become a persistent and permanent feature of Australia's security environment.'[212]

Although Australia has not gone so far in its anti-terror legislation as to utilise such language as 'Patriot Act', 'the media have noticed the Orwellian character of some of the titles, such as the New South Wales Freedom of Information (Terrorism and Criminal Intelligence) Act of 2003.'[213] The example of Australia, who appear to have become caught-up in the 'War on Terror', conveys how the whole system of checks and balances between the branches of government are, in such crisis situations, rendered utterly ineffective- even the courts, intended to act as 'the last line of defence for human rights' are often paralysed:

'In contemporary democracy, in the matter of anti-terrorist legislation, the usual protections and balances may not always be available either in the legislative process or in executive enforcement. Nations that are minor players in the global "war on terrorism" sometimes come under international pressure that they cannot resist to adopt counterpart laws. Necessarily, the courts have only a limited role. Their duty is to give effect to any laws that are constitutionally valid.'[214]

In the case of *R* v *Lodhi* (2006) for example,[215] the constitutionality of the National Security Information (Criminal and Civil proceedings) Act 2004 was argued, because it rendered those accused of having committed terrorist offences to being

[212] Australian Government, *Counter-Terrorism White Paper: Securing Australia- Protecting Our Community* (2010) (ii), cited in: George Williams, 'A Decade of Australian Anti-Terror Laws', *Melbourne University Law Review* Vol. 35 (2011) p. 1138. Available at: http://www.mulr.com.au/issues/35_3/35_3_13.pdf Last accessed July 2017.

[213] Michael Kirby, 'Terrorism: The International Response of the Courts (The Institute for Advanced Study Branigin Lecture) *Indiana Journal of Global Legal Studies* (Winter 2005) Vol. 12(1) p. 323. Available at: http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1299&context=ijgls Last accessed July 2017.

[214] *Ibid.* p.324.

[215] *R* v *Lodhi* (2006) 163 A Crim R 448 (Australia).

sentenced 'through a process incompatible with the exercise of judicial power.'[216] In the Supreme Court of New South Wales, Justice Whealy held that the legislation was not inconsistent with judicial power; on appeal this decision was upheld, noting that the legislation merely 'tilted the balance' towards national security, but this did not render it invalid.[217] It could indeed be argued that the domestic constitutional framework facilitates the way for exceptional anti-terror legislation, instead of providing a robust checking function. This was further accepted by the Australian courts in the case of *Thomas* v *Mowbray* (2007),[218] where the government's use of control orders was challenged on constitutional grounds, in line with Ch III of the Constitution.[219] The High Court decided that the government had legitimate power to enact laws 'with respect to the defence of the nation.'[220] Although subsequent caselaw has invalidated numerous control order provisions, the basis for doing so has not focused on the restriction on liberties or the infringement of constitutional values, but instead on the scope of judicial power.[221]

'Following Thomas v Mowbray, control orders presented an attractive, and apparently constitutionally permissible, means of cracking down on feared groups within the community before crimes had necessarily been committed…[these] High

[216] George Williams, 'A Decade of Australian Anti-Terror Laws', *Melbourne University Law Review* Vol. 35 (2011) p.1156. Available at: http://www.mulr.com.au/issues/35_3/35_3_13.pdf Last accessed July 2017.
[217] *Lodhi v The Queen* (2007) 179 A Crim R 470, 487-488 [66] – [67] (Australia).
[218] *Thomas* v *Mowbray* (2007) 233 CLR 307 (Australia).
[219] The Australian Constitution: Commonwealth of Australia Constitution Act, Ch III. Available at: http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution Last accessed July 2017.
[220] Rebecca Ananian-Welsh, George Williams, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia' *Melbourne University Law Review* Vol. 38 (2) (2014) p. 374.
[221] Please see *South Australia* v *Totani* (2010) 242 CLR 1; *Wainohu* v *New South Wales* (2011) 243 CLR 181.

Court decisions lent the schemes [of control orders] the appearance of constitutional legitimacy.'[222]

Where the domestic institutions are largely paralysed by anti-terror legislation enacted by a legitimate government and protected under the tests of judicial review, the only recourse for human rights protections is often international law.

'In the absence of a national scheme of human rights protection, such as a national human rights Act, the possibilities for legal challenge to any of Australia's anti-terror laws are very slight.'[223]

If domestic courts are able to make reference to international law on human rights, then this may provide a sufficient ground for challenging unconstitutional anti-terror legislation.[224] Thus, we can see that under our existing system of international law, international human rights law is already the last resort and ultimate protector, where the constitutional system has broken down in a state and the checks and balances system has been incapacitated. However, this comes with the caveats that said state must have granted the relevant international bodies the jurisdiction to intervene, and claimants are often restricted in their access to international judicial bodies on account of the procedural requirement to exhaust all domestic legal remedies.

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[222] Rebecca Ananian-Welsh, George Williams, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia' *Melbourne University Law Review* Vol. 38 (2) (2014) p. 401.

[223]George Williams, 'A Decade of Australian Anti-Terror Laws', *Melbourne University Law Review* Vol. 35 (2011) p.1157. Available at: http://www.mulr.com.au/issues/35_3/35_3_13.pdf Last accessed July 2017.

[224] Michael Kirby, 'Terrorism: The International Response of the Courts (The Institute for Advanced Study Branigin Lecture) *Indiana Journal of Global Legal Studies* (Winter 2005) Vol. 12(1) p. 325. Available at: http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1299&context=ijgls Last accessed July 2017; *Mabo* v *Queensland* [No 2] (1992) 175 C. L. R 1, 42.

Former Prime Minister, Keven Rudd, in a national security statement in 2008 stated it most accurately in asserting that:

'Our national security interests must also be pursued in an accountable way which meets the government's responsibility to protect Australia, its people and its interests while preserving our civil liberties and the rule of law. This balance represents a continuing challenge for all modern democracies seeking to prepare for the complex national security challenges of the future. It is a balance that must remain a conscious part of the national security policy process. We must not silently allow any incremental erosion of our fundamental freedoms.'[225]

Despite stipulating such formal commitments to balancing security with human rights protections, it certainly appears as though Australia, alongside many states, have indeed lost their way somewhat and offered a 'piecemeal review' of anti-terror measures.[226] Australia provides the most striking example, therefore, of what Professor Kent Roach coins as the 'hyper-inflation' of anti-terror laws.[227] Although this is worrying in itself, when coupled with the rapid pace of enactment and lack of transparency in the process of scrutinising and passing bills, it has led to unchecked and undebated legislation being passed at such a speed that civil society is unable to keep abreast of its effect. 'The relentless legislative output' is thus highly corrosive to democratic structures, as checks and balances fall by the wayside, as do the rights and freedoms of citizens, often without them even realising.[228]

[225] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2008, 12551-2 (Kevin Rudd) cited in: George Williams, 'A Decade of Australian Anti-Terror Laws', *Melbourne University Law Review* Vol. 35 (2011) p.1139. Available at: http://www.mulr.com.au/issues/35_3/35_3_13.pdf Last accessed July 2017.
[226] *Ibid.* p. 1158.
[227] Kent Roach, *The 9/11 Effect* (Cambridge University Press, 2011) p. 309.
[228] *Ibid.* p. 310.

This is further exacerbated by the absence of a Human Rights Act or Bill of Rights in Australia, and a Constitution which is largely silent on rights-protections and thus leaves citizens' rights open to manipulation,[229] with their only possible recourse proving to be international human rights treaties and their judicial mechanisms for redress. However, even this avenue for accountability is limited in its capacity, as international treaties are required to be incorporated into domestic law in order to be given legal effect- consequently, Australia's sovereignty under exceptionalism appears to be boundless. [230]

'The rule of law, the late great English jurist Tom Bingham wrote in 2010, is what separates a democratic society from a capricious authoritarian state. He argued that there is a "strong temptation" on the part of governments dealing with terrorism "to cross the boundary which separates the lawful from the unlawful". Unfortunately, Australia has well and truly crossed that threshold… ***Welcome to authoritarian Australia****."*[231]

[229] The Australian Constitution: Commonwealth of Australia Constitution Act. Available at: http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution Last accessed July 2017.

[230] *Please see*: Devika Hovell, 'The Sovereignty Stratagem: Australia's Response to UN Human Rights Treaty Bodies' (2003) 28 *Alternative Law Journal* 297.

[231] Greg Barns, 'Welcome to Authoritarian Australia, where more Anti-Terror Laws won't keep us safe', (The Guardian, 13 October 2015) Available at: https://www.theguardian.com/commentisfree/2015/oct/13/welcome-to-authoritarian-australia-where-more-anti-terror-laws-wont-keep-us-safe Last accessed July 2017.

C. France & The Bandwagon Effect: 'Je Suis Charlie'..et toi?

To serve as proof that no corner of our globe has been untouched and untainted by the effects of terrorism, let us turn to a European example. A country which has a proud history of constitutional law, firmly entrenched human rights and democratic values, alongside a deeply-felt respect for the rule of law. Even within such a setting, the threat of terrorism has brought about a return to nationalistic sentiment and isolationism. Thus, we turn to the sphere of constitutional law and its interaction with international law, in relation to the French reaction to the 'War on Terror'.

The current Constitution, formally titled, The Constitution of the Fifth Republic was adopted in 1958 and was largely the result of the work of Charles De Gaulle.[232] The Preamble explicitly refers to the texts of The Declaration of the Rights of Man and of the Citizen (1789),[233] and the preamble to the 1946 Constitution.[234] In the case of the Constitutional Council in 1971, [235] it was declared that the Constitution referred to not only its own contents but also the 'Constitutional Block' which included the aforementioned texts. It is largely the responsibility of the Constitutional Council (Conseil Constitutionnel) established in 1958, to uphold the principles and rules of said Constitution. Its primary purpose is to rule on whether potential bills are constitutional or not, after being voted on by Parliament and prior to being granted legal effect by their signature into law by the President of the Republic of France.

[232] The Constitution of the Fifth Republic (1958) (France).
[233] The Declaration of the Rights of Man and of the Citizen (1789).
[234] The Constitution of the Fourth Republic (1946) (France).
[235] Constitutional Council (71-44DC) (1971) (France).

Since 2010, individuals whom are party to a lawsuit, have also been granted standing to ask the Council to review the legality of the legislation relevant to their case, and rule on whether said legislation is constitutional or not.

With such a backdrop, it seems highly unlikely that a constitutional crisis could in fact occur in such a setting of constitutional protections, checks and balances and a deeply-entrenched respect and regard for the rule of law and human rights protections. So, we must ask ourselves, why it is necessary to scrutinise the constitutional legal controversies facing France.

On 7 January 2015, a car drove up to the offices of the satirical magazine, Charlie Hebdo, in Paris and two masked gunmen, Cherif and Said Kouachi (French Muslims of Algerian descent) shot and killed 12 people and wounded a further 11.[236] The two perpetrators, who self-identified as Islamists and were affiliated with Al-Qaeda in Yemen, were joined by a third gunman who carried out simultaneous shootings and a hostage-taking at a market store. All had pledged allegiance to the Islamic State of Iraq and the Levant. The former attack on the Office of Charlie Hebdo was largely deemed to be in response to their publication of numerous cartoons of the Prophet Muhammed. In the wake of this attack, then President Francois Hollande instantly labelled it a 'terrorist attack of the most extreme barbarity.'[237] The gravity of the attacks shook the world, and support for France ricocheted across the world, as states and peoples wished to offer their condolences and display their solidarity in the face of terrorism. As an act of defiance against terrorist acts, Charlie Hebdo announced the continuation of its publication and the

[236] 'Charlie Hebdo Shooting: At least 12 killed as shots fired at satirical magazine's Paris Office' (7 January 2015, The Independent) Available at: http://www.independent.co.uk/news/world/europe/charlie-hebdo-shooting-10-killed-as-shots-fired-at-satirical-magazine-headquarters-according-to-9962337.html Last accessed July 2017.
[237] *Ibid.*

increase in its printed copies for that next upcoming issue, the revenue of which would go to the families of the victims.

The legacy of the attack on Charlie Hebdo was the conflict between freedom of expression and speech and the freedom of religion. Following the attacks, as a sign of solidarity, the French community and large parts of the international community coined the phrase 'Je Suis Charlie', or 'I am Charlie'. The phrase reverberated as a battle-cry in favour of the freedom of expression, and proved boundless as it spread across social media. It soon became an iconic image, 'hashtagged' and written on placards to be held-high at internationally-held vigils.

France has a deeply-entrenched respect for the freedom of expression as a fundamental human right, codified in The Declaration of the Rights of Man and of the Citizen (1789),[238] and incorporated into the French Constitution, Articles 10 and 11.[239] Therefore, this attack on one of its central constitutional values struck the very heart of France. Indeed, Article 11 stipulates:

'The free communication of ideas and of opinions is one of the most precious rights of man. Any citizen may therefore speak, write and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by law.'[240]

The 'us' vs 'them' dichotomy created by those supporting freedom of religion and protection of the sanctity of their religion above all other rights, against the proponents of freedom of expression and speech proved most turbulent. Civil unrest was witnessed in the wake of the Charlie Hebdo attacks across the world- in Niger,

[238] The Declaration of the Rights of Man and of the Citizen (1789).
[239] *Ibid.*
[240] The Declaration of the Rights of Man and of the Citizen (1789) Article 11, Cited in: Andrew Weber, 'Freedom of Speech in France: FALQs' (Library of Congress, 27 March 2015) Available at: https://blogs.loc.gov/law/2015/03/falqs-freedom-of-speech-in-france/ Last accessed July 2017.

10 people died and more were injured as a result of protests held against the publication of cartoons of the Prophet Mohammad by Charlie Hebdo. [241] Muslim youths set churches alight and attacked police stations in the capital city, Niamey. Although the President of Niger President Mahamadou Issoufou condemned this behaviour and asserted that the perpetrators clearly had 'understood nothing of Islam', he did share the disdain felt by Muslims who had been offended by the Charlie Hebdo cartoons of the Prophet.[242] With the front cover of the next issue of the publication showing yet another image of the Prophet, this again sparked violent protests across many states- including Algeria, Niger and Pakistan.

A month later, on 14 February 2015, a gunman in Copenhagen, Denmark fired a gun at an event in favour of free speech which was being hosted by a Swedish artist who had similarly allegedly defamed the Prophet Mohammed, by placing His head on a dog's body. [243] In response to this attack, Former President of France, Francois Hollande again remarked:

> *'Denmark and France are the same nations, feeling the same sadness but all the same will to resist, fight and defeat terrorism…they hit the same targets, they hit what we are, what we represent, the values of freedom, the rule of law, that all citizens, whatever their religion, should be able to enjoy.'*[244]

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[241] Abdoulaye Massalaki, 'Five Killed in Second Day of Charlie Hebdo Protests in Niger' (Reuters, 17 January 2015) Available at: http://www.reuters.com/article/us-france-shooting-niger-idUSKBN0KQ0BP20150117 Last accessed July 2017.

[242] *Ibid.*

[243] Sabina Zawadzki, Ole Mikkelsen, 'Danish Police Kill 22-year old suspected of Copenhagen shootings', (Reuters, 15 February 2015) Available at: http://www.reuters.com/article/2015/02/15/us-denmark-shooting-idUSKBN0LI0N720150215. Last accessed July 2017. Cited in: Daniela Abratt, 'Charlie Hebdo: Freedom of Expression Versus the Protection of Religious Feelings' (4 March 2015) *Florida International Law Review.* Available at: https://law.fiu.edu/charlie-hebdo-freedom-of-expression/#_edn3 Last accessed July 2017.

[244] *Ibid.*

But if we remove ourselves from the bandwagon of fear and propaganda for a moment, we could perhaps see that Muslims have a valid legal argument, and that the question of conflicting rights is one which needs to be posited without being clouded by emotions. Ultimately, 'where should the line be drawn between what is acceptable criticism and what speech constitutes "incitement to religious hatred" and is therefore punishable?'[245] Under international law, the right to receive and impart information includes that which 'offends, shocks or disturbs', in accordance with the ICCPR, Article 19 (2),[246] and the Universal Declaration of Human Rights, Article 19.[247]

In the context of the Charlie Hebdo publication in particular, it is clear to see that their cartoons might prove insulting to many groups and individuals, but those producing it were merely exercising their right to express their views. Thus, a balancing exercise must result from this conflict.

> '*The cartoons, though depictions of religious figures, usually had a political undertone, which grants them further protection. In this instance, the scales of justice should give greater weight to that freedom of expression which is so fundamental in today's society.*'[248]

Interestingly, the creators of Charlie Hebdo did not identify the 'them' camp in the debate as being proponents of religious freedom, but instead as terrorists who instil fear and hatred. Their religious depictions were not singling-out one particular religion for ridicule- but took the same approach with numerous other religions. In

[245] *Ibid.*
[246] ICCPR, Article 19(2).
[247] UDHR, Article 19.
[248] Daniela Abratt, 'Charlie Hebdo: Freedom of Expression Versus the Protection of Religious Feelings' (4 March 2015) *Florida International Law Review.* Available at: https://law.fiu.edu/charlie-hebdo-freedom-of-expression/#_edn3. Last accessed July 2017.

such a way, why should the Office of Charlie Hebdo refrain from targeting Islam out of fear of terrorist reprisals? One of the cartoonists had previously stated:

'When we attack the Catholic hard right…nobody talks about it in the papers. It's as if Charlie Hebdo has official authorisation to attack the Catholic hard right. But we are not allowed to make fun of Muslim hardliners. It's the new rule…but we will not obey it.'[249]

Pivotally, the laws relating to press freedom and freedom of expression are 'considered one of France's foundational laws', and thus The Law on Freedom of the Press (1881) is worthy of note (Sur la Liberte de la Presse 1881). [250] This legislation was amended in 1972 to prohibit hate speech intending to: 'provoke discrimination, hate, or violence towards a person or a group of people because of their origin or because they belong or do not belong to a certain ethnic group, nation, race or religion.'[251] The adjudication of such cases have regularly arisen in the French courts, indeed Charlie Hebdo had been sued approximately 50 times from 1992 until 2014 by predominantly religious groups. The newspaper had won most of their cases, but had lost in others, mainly on the basis of personal defamation as opposed to hate speech. [252] The central question posited in these court cases: do the publications of Charlie Hebdo constitute hate speech? One of the most controversial lawsuits resulted from a Charlie Hebdo publication in 2006 which displayed an

[249] Brian Love, 'No Rules, No Regrets for French Cartoonists in Mohammed Storm' (Reuters, 19 September 2012) Available at: http://www.reuters.com/article/film-protests-charlie-idUSL5E8KJE6320120919 Last accessed July 2017.
[250] Andrew Weber, 'Freedom of Speech in France' (Library of Congress, 27 March 2015) Available at: https://blogs.loc.gov/law/2015/03/falqs-freedom-of-speech-in-france/ Last accessed July 2017.
[251] *Ibid.*
[252] Peter Noorlander, 'When satire incites hatred: Charlie Hebdo and the freedom of expression debate' (Media Legal Defence Initiative, 27 January 2015) Available at: http://journalism.cmpf.eui.eu/discussions/when-satire-incites-hatred/ Last accessed July 2017.

image of the Prophet Muhammad guarding the gates of heaven, with a caption to a queue of suicide bombers, stating: 'Stop! Stop! We have run out of virgins!'[253] A group of Islamic groups sued the magazine for inciting hatred, but a Paris court ruled that this could not be deemed 'hate speech'. Said court instead reiterated the importance of free speech in a democratic society, which included views which may offend others. The overarching message of this court ruling was:

'If you don't like the cartoon, don't buy the magazine'.[254]

However, this firm commitment to freedom of speech has left the French government open to criticisms of hypocrisy. On the same day as Charlie Hebdo sold its first issue post-attack, featuring the cover image of the Prophet Muhammad, police arrested a comedian and activist Dieudonne M'bala M'bala, renowned for his controversial statements in defiance of the French establishment, for posting on Facebook, 'Je me sens Charlie Coulibaly' (Coulibaly was the perpetrator of the concurrent terror attacks on the market store the same day as the Charlie Hebdo attacks).[255] This post was alleged to be an 'incitement of terrorism', a crime which is now included into the 1881 Law.

'The juxtaposition of the two events- the celebration of a magazine that routinely publishes cartoons considered blasphemous and offensive by many of the world's Muslims and the muscular prosecution of a relentlessly provocative black comedian- has immediately exposed France to charges of hypocrisy and double standards.'[256]

[253] *Ibid.*
[254] TGI Paris 17e ch. Corr., 22 March 2007, Case No 2007-327959. Cited at *Ibid.*
[255] Alexander Stille, 'Why French Law Treats Dieudonne and Charlie Hebdo Differently' (15 January 2015, The New Yorker) Available at: http://www.newyorker.com/news/news-desk/french-law-treats-dieudonne-charlie-hebdo-differently Last accessed July 2017.
[256] *Ibid.*

This apparent double-standard in locating freedom of speech can find its roots in a long-standing commitment of the government to advocate for individuals, above churches and their doctrines- irrespective of which religious mandate they hold. Such issues have similarly arisen with individuals who deny the holocaust, which is formally a crime under a law passed in 1990. The aforementioned Dieudonne has fought for his freedom of speech in denying the holocaust indirectly by inviting a famous holocaust-denier, Robert Faurisson, to speak at his comic performances. However, in 2013, the French parliament further extended the scope of the 1990 law by including 'indirect incitement', which thus included Dieudonne's invitation of Faurisson.[257] The inherent ambiguities in interpreting France's constitutional values have rendered the government vulnerable to allegations of favouritism and hypocrisy, thus undermining their legitimacy.

This seemingly anti-Muslim rhetoric has proven to be deeply etched into the fabric of French society, even beyond the Charlie Hebdo attacks. In 2004, Parliament enacted the 'veil' law which banned Muslim girls attending public schools from wearing headscarves. In 2010, Parliament moved one step further and banned full-face covering veils in public places.[258] These laws were viewed by many as an attack on the Muslim identity of many French citizens. However, many have instead argued that what we are witnessing in France is not an anti-Muslim sentiment, but merely an anti-religious tendency of the state.[259] There is not only a clear separation between the church and the state in France, but also an underlying hostility towards religion.

Resulting from the Charlie Hebdo attacks, and the enactment of legislation to restrict Muslim identity and religious freedom, France's response has been a retreat

[257] *Ibid.*
[258] *Ibid.*
[259] *Ibid.*

into nationalism and isolationist rhetoric in recent years. Exacerbated further by a media which fails to grant air-time to minority or religious communities in France, reels of propaganda in favour of non-religious voices results, and stereotypes and generalisations flourish.

In 2017, this increasing nationalism in France reached new heights in the events surrounding the French Presidential election. The two dominant candidates battling for the position of the French Presidency could not have been more divergent in their policies and views- namely Marine Le Pen and Emmanuel Macron. The latter proved victorious, with his liberal and progressive policies- the stage has thus been set for greater interaction with the international community and a return to human rights and constitutional protections. The Presidential vote indicated the support from the French population in favour of greater integration and tolerance, and a rejection of nationalistic and isolationist policies. Thus, it seems that the French people have chosen a future of greater understanding of, and interaction with the international community. President Macron had previously denounced the Muslim headscarf ban,[260] and has stood in defiance of the indefinite nature of France's 'state of emergency' in the wake of 09/11- the future for France's constitutional protections appears bright, but any future terror attacks could destabilise the situation once more. The rhetoric of 'Je Suis Charlie' showcases the contagious effects of terror attacks and 'fear', and serves as a vital reminder to refrain from counteracting one form of 'terror' with another 'legitimised terror' invoked by the state in its counter-terror measures.

[260] 'Voile a l'universite: Macron prend le contre-pied de Valls' (Le Figaro, 12 July 2016) (In French) Available at: http://www.lefigaro.fr/flash-actu/2016/07/12/97001-20160712FILWWW00348-voile-a-l-universite-macron-prend-le-contre-pied-de-valls.php Last accessed July 2017.

'*The right response is not ever more repressive legislation and the choice is not one between security and the rule of law…If we give up the rule of law, we're headed toward a police state and arbitrary justice.*'[261]

D. The International Riposte

'*The legal supervision of states of emergency is of primary importance, as grave human rights violations often occur in this context and states may use the power of derogation as a pretext or to a larger extent than is justified.*'[262]

In the wake of the 09/11 terror attacks on the United States of America, the United Nations foresaw an inevitable shift in security concerns and therefore domestic legislation on terrorism. An inevitable by-product of this would prove to be the widespread violation and neglect of human rights laws and norms which had taken decades of hard work to make their way to the forefront of domestic politics in many states. The extent to which human rights would be disregarded in favour of anti-terror protections and legislation was, I assert, not wholly foreseeable. Had it been, perhaps the stance of the United Nations would have been quite different.

[261] Mark Deen, 'France's Indefinite State of Emergency is a Mistake' (Bloomberg, 12 October 2016) Available at: http://www.bloomberg.com/news/articles/2016-10-11/france-s-indefinite-state-of-emergency-is-a-mistake-macron-says Last accessed July 2017.

[262] Venice Commission on Science and Technique of Democracy, 'No 12: Emergency Powers' (1995); Venice Commission on Science and Technique of Democracy, 'No 17: Human Rights and the Functioning of the Democratic Institutions in Emergency Situations' (1996) Cited in: Scott Sheeran, 'Reconceptualising States of Emergency under International Human Rights Law: Theory, Legal Doctrine and Politics' *Michigan Journal of International Law* Vol. 34(3) (2013) p. 518. Available at: http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1000&context=mjil Last accessed July 2017.

Following the events of 09/11, the United Nations Security Council passed Resolution 1373 on 28 September 2001,[263] which asserted the need for states to pass legislation to ensure that accountability flowed from terrorist crimes:

'[to ensure that] terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.'[264]

In response to this, fearful states promulgated reams of anti-terror legislation intended to confront this threat; importantly, huge amounts of this legislation went largely unchecked, undebated and pushed through political processes with haste and urgency. It was this initial indicator that terrorist crimes went outside the remit of ordinary criminal law that essentially warranted their exceptionalism, and put a focus on preventative legislation which encroached heavily upon individual liberties.

What we can draw from the aforementioned case studies is that often the law is only one part of the equation- it provides both an alleged solution to counter terrorism, alongside newfound problems. As Williams asserts:

'Anti-terror laws have a role to play in the prevention of terrorist attacks. However, enacting such laws comes with significant costs.'[265]

The more corrosive of the effects of such legal measures, evidenced internationally, is the ostracism and alienation felt by certain communities, whom we have been indoctrinated into fearing and suspecting. At first, such suspicion was confined to

[263] Security Council Resolution 1373, UN SCOR, 56th session, 4385th Meeting, UN Doc S/RES/1373 (28 September 2001). Cited in: George Williams, 'A Decade of Australian Anti-Terror Laws', *Melbourne University Law Review* Vol. 35 (2011) p.1140. Available at: http://www.mulr.com.au/issues/35_3/35_3_13.pdf Last accessed July 2017.
[264] Security Council Resolution 1373, UN SCOR, 56th session, 4385th Meeting, UN Doc S/RES/1373, para 2(e) (28 September 2001). Cited in: *Ibid.* p.1140.
[265] *Ibid.* p. 1172.

the sphere of media speculation and sensationalism, but as this digressed into the courtrooms, we have witnessed a complete inversion of the 'presumption of innocence'. The targeting of certain groups and individuals 'is the dynamic that terrorists rely upon' as terrorism 'requires nations to overreact in their attempts to prevent future attacks', in order to continue the cycle of fear which feeds reactions and then subsequent attacks.[266] In this way, anti-terror laws do not provide the solution, especially when promulgated at such a pace and with such a lack of scrutiny. The ultimate solution is to confront terrorism collectively as one united alliance, prioritise countering-extremism in both terrorist activities and counter-terrorist reactions- this can only be done through international channels and within the parameters of international human rights norms. Former Secretary-General Kofi-Annan, most eloquently stated in 2005:

'Human rights law makes ample provision for strong counter-terrorist action, even in the most exceptional circumstances. But compromising human rights cannot serve the struggle against terrorism. On the contrary, it facilitates achievement of the terrorist's objective- by ceding to him the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is more likely to find recruits.'[267]

With regard to the overarching growth of 'states of exception', their potential to threaten the key tenets of international human rights law and international institutions is worrying. Indeed, the depth of crises and the proliferation of 'states of exception' in the international community has largely ensured the permeation of this

[266] *Ibid.* p. 1173.

[267] Kofi Annan, 'A Global Strategy for Fighting Terrorism' (Speech delivered at the Closing Plenary of the International Summit on Democracy, Terrorism and Security, Madrid, 10 March 2005) Available at: https://www.un.org/sg/en/content/sg/statement/2005-03-10/secretary-generals-keynote-address-closing-plenary-international Last accessed July 2017.

exceptionalism into the international sphere. Resultantly, this rhetoric is now commonplace in international law and is incapacitating its existing mechanisms. Fractured by widespread derogation by states from international human rights protections, coupled with largely erratic compliance, interaction and dialogue with international law- the future of international human rights law under the overarching theme of state exceptionalism appears uncertain. Ironically, such exceptionalism within the domestic domain of states, often justified on the basis of a 'threat to the life of a nation' is arguably threatening the very life of international human rights law, both in terms of its body (structure and mechanisms) and its organs (substantive mandate and norms).

State exceptionalism is exacerbated further by the fact that international precedent on situations of state 'emergency' or 'exception' are far from convergent and coherent, 'what now constitutes a public emergency is ubiquitous.'[268] It certainly seems as though the international community is largely ill-equipped to understand 'states of exception' and thus fails to protect human rights when such situations arise. Originating from 19th century Western Europe, the notion has long-proven to be a label which can easily be attached to a government in order to 'provide instant legitimacy to the greater limitation of human rights by government.'[269] International law largely foresaw the inevitability of such games of power within the political domains of domestic states, and thus attempted to find a place for 'states of exception' within the legal structure, to avoid states merely retreating or withdrawing from human rights treaties during periods of exceptionalism or

[268] Scott Sheeran, 'Reconceptualising States of Emergency under International Human Rights Law: Theory, Legal Doctrine and Politics' *Michigan Journal of International Law* Vol. 34(3) (2013) p. 491. Available at: http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1000&context=mjil Last accessed July 2017.
[269] *Ibid.* p.492.

emergencies. In trying to bring exceptionalism within the confines of international human rights law, the latter has largely offered indirect consent to, and endorsement of, state violations of human rights. The possibility of derogation from rights which we have claimed are interdependent, interconnected, universal etc., insults the very essence of the spirit and culture of international human rights law. Although derogatory clauses were initially used as a means for states in crises to temporarily suspend certain legal obligations- the perpetual nature of the crises we see taking hold of states renders this temporality null and void. Derogation, as with 'states of exception' have largely become 'the rule'.

'The two legal questions that constitute the heart of the derogation regimes are first, whether a situation constitutes a "public emergency which threatens the life of the nation", and second, whether the measures are "strictly required by the exigencies of the situation."'[270]

This is further reinforced by Human Rights Committee General Comment No 29 on 'States of Emergency' (2001), which states that:

'*Before a state moves to invoke Article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the state party must have officially proclaimed a state of emergency.*'[271]

With a derogatory mechanism in place for international human rights law under these provisions- 'in practice [states] have co-opted and distorted the derogation regime.'[272] To determine the extent of exceptionalism and thus the extent to which we are allowing for such derogation, let us turn to the Special Rapporteur for States

[270] ICCPR, Article 4 (December 16 1966) S. Treaty Doc No 95-20, 999 U.N.T.S. 171. Cited in: *Ibid.* p.492.
[271] Human Rights Committee, 'General Comment No 29: States of Emergency' 2,4 UN Doc. CCPR/C/21/Rev.1/Add.11 (August 31, 2001) Cited in: *Ibid.* p. 492.
[272] *Ibid.* p.492.

of Emergency, who has researched this extensively, and published a final report in 1997. The findings therein held that approximately 95 states, almost half of the total number of states in the international community, had been in a 'state of emergency', be it formally declared or not, between the short period of 1985 and 1997. [273]

The clear void between the provisions on derogation within treaty law, and the international interpretation and application of said provisions seems inevitable- if you grant states the power to determine when they can withdraw their consent on certain human rights protections, creative interpretation and justifications will preclude respect for said provisions when it is convenient for states to do so. During the time that the UN Commission on Human Rights was drafting the ICCPR and ICESCR, there was recognition that the derogation provisions 'might produce complicated problems of interpretation and give rise to considerable abuse.' [274] Considering the foreseeability of such an issue, we must ask ourselves why a more preventative solution was not located, and a way of recognising exceptionalism and emergency situations without incapacitating international law and its mechanisms realised.

This determination of whether a 'state of exception' has been justifiably evidenced by a state is often left to the determination of states themselves or regional treaty bodies. For example, The European Court of Human Rights is capable of making such a finding, wherein it balances the limitations placed on human rights with 'the threat to the life of a nation' on the basis of a doctrine of 'margin of appreciation'. [275]

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[273] Special Rapporteur for States of Emergency, *The Administration of Justice and the Human Rights of Detainees: Questions of Human Rights and States of Emergency: Final Report* UN Doc E/CN.4/Sub.2/1997/19.Add.1 (9 June 1996). Cited in: *Ibid.* p. 493.
[274] UN Secretary-General, *Annotations on the Text of the Draft International Covenants on Human Rights,* Ch. V, para 36, UN Doc A/2929 (July 1 1955) Cited in: *Ibid.* p. 493.
[275] For further discussion *please see*: Eyal Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' 31 *International Law and Pol.* 843, 844-45 (1999).

This legal test, in the context of the ECtHR has proven to have a low threshold- in one case in the United Kingdom in 2009, it was accepted that a 'state of emergency' existed on account of a threat of terrorism, despite no actual attack having taken place.[276] These flexible provisions ultimately allow for exceptionalism in many situations and 'has provided a veneer of legality to specious claims by governments and has undermined the normativity of the law.'[277]

Professor Sheeran, in his 2013 work on the interplay between 'States of Emergency' and international human rights protections, identifies that although many academic attempts have been made to address these flaws they have 'tended to be highly formalistic...calling essentially for more and stricter rules'- Sheeran deems this unrealistic for the realm of international human rights law.[278] He asserts that renewed interest in the topic has resulted post-09/11, as new dynamics of 'states of exception' have emerged, and proven once-more that our treaties and mechanisms for protecting human rights fail to take into account many political and theoretical nuances. I would instead assert that these mechanisms and laws fail to take into account human nature, as we increasingly see a world comprised of states whose leaders prioritise power, money, legitimacy and self-interest above and before human rights. As Sheeran explains, our mechanisms are largely based on a rule of law model, which largely fails to take into account the realities of politics, the 'character traits' of states, or nuances in their behaviour.[279] We are increasingly witnessing a retreat back to state sovereignty by authoritarian states, and with this

[276] *A &Others* v *United Kingdom*, App. No 3455/05 para 175-181 (European Court of Human Rights, 2009).
[277] Scott Sheeran, 'Reconceptualising States of Emergency under International Human Rights Law: Theory, Legal Doctrine and Politics' *Michigan Journal of International Law* Vol. 34(3) (2013) p. 494. Available at: http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1000&context=mjil Last accessed July 2017.
[278] *Ibid.* p. 494.
[279] *Ibid.* p. 494.

shift away from the rule of law, our existing mechanisms are in real danger of extinction.

Professor Sheeran's solution lay in redefining the question of whether a 'state of emergency' has emerged or not as a political question, and no longer a legal one.[280] This seems to me to be more in-keeping with the realistic behaviour of states and is capable of taking account of the increasingly perpetual nature of exceptionalism and the inability to decipher not only when it has started, but also when it has come to an end. Thus, we must strive to reconcile the seemingly incompatible conflict between the collective interests of a state, with the individual interests of its citizens. Derogation provisions merely justify state actions in deciding to prioritise the former and suspend the latter, but are framed as the balancing of the two. McGoldrick asserts that:

> *'the idea of limitations is based on the recognition that most human rights are not absolute but rather reflect a balance between individual and community interests.'*[281]

Indeed, if we look to any of our international human rights treaties, we can locate derogation and limitation clauses which largely cripple the power and enforceability of the norms and protections therein. For example, the Universal Declaration of Human Rights (1948) includes a general limitations clause in Article 29.[282] How are we capable of preaching the universality of human rights, if we endorse a dichotomy of normalcy v exceptionalism, wherein human rights demand total respect and compliance during the former, but can be limited and suspended under the latter? Furthermore, as we evidenced in this section, it is actually during the

[280] *Ibid.* p. 495.
[281] Dominic McGoldrick, 'The Interface between Public Emergency Powers and International Law' Vol. 2 *International Journal of Constitutional Law* (2004) p.383.
[282] Universal Declaration of Human Rights (1948), Article 29.

latter periods of exceptionalism that we need these human rights protections the most, and yet we have rendered our laws powerless to do so. Although the overarching aim of a state in exceptionalism is to return to normalcy, whereupon human right provisions will resume- these definitions are far too broad to hold states to account to them.[283] It is my assertion that irrespective of whether a state deems itself to be in a situation of normalcy or exceptionalism, the rule of law, must be consistently maintained and protected. For some human rights advocates, this is referred to as 'the principle of legality'.[284] In my mind, suspending the rule of law during times of crises is counter-intuitive, as it is for precisely these situations that the rule of law was constructed in the first place, and precisely the by-products of exceptionalism under authoritarian regimes which it is fully-equipped to confront and remedy. In times of crisis, why would we incapacitate our greatest tool to ensure human rights protections?

Ultimately, a 'state of exception' label denotes a state's disengagement from international human rights law, and grants it the legitimacy of doing so. In this way, we indirectly legitimise the human rights abuses committed during periods of exceptionalism. This key idea of 'institutionalising the emergency' has been summarised by the UN Special Rapporteur for States of Emergency, Mr Despouy, in stating:

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[283] Human Rights Committee, 'General Comment No 29: States of Emergency' UN Doc. CCPR/C/21/Rev.1/Add.11 (2002), para 1-2, quoted: 'The restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a state party derogating from the covenant.' Available at: http://hrlibrary.umn.edu/gencomm/hrc29.html Last accessed July 2017.

[284] Scott Sheeran, 'Reconceptualising States of Emergency under International Human Rights Law: Theory, Legal Doctrine and Politics' *Michigan Journal of International Law* Vol. 34(3) (2013) pp. 501-502. 494. Available at: http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1000&context=mjil Last accessed July 2017.

'[The] normal legal order subsists although, parallel to it, a special, a para-constitutional legal order begins to take shape…allowing the authorities to invoke, according to the needs of the moment, either the normal legal system or the special system, although in practice is clearly relinquished in favour of the latter.'[285]

One specific area in which the international community and international legal mechanisms has struggled in particular, is with the legal distinctions relating to 'war'; predominantly, for our purposes, the distinction between 'combatant' and 'non-combatant', and interpretations of 'armed conflict' and 'self-defence'. The Geneva Conventions have laid down the different legal categories of combatants during times of conflict, and the relevant protections which should be afforded to them, in line with international humanitarian law. Furthermore, the United Nations Charter lays down the legal basis for states to use armed force- force may be used by a state when permission is given from the UN Security Council, or the grounds of 'self-defence' can be invoked by a state who has suffered an 'armed attack' and this bypasses the Security Council.[286] After 09/11, the USA argued that the attacks on US soil satisfied the requisites to be deemed an 'armed attack' and thus self-defence could be invoked. Although this legal reasoning appears sound, the scope of the US application of this self-defence has proved expansive:

'This position does not allow the United States wide latitude in its employment of force, however. As an act of self-defence, the use of force by the United States can

[285] Special Rapporteur's 10th Report, para. 131-132. Cited in: *Ibid.* p. 512.

[286] United Nations Charter, Article 51 stipulates: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security'.

only be directed at those who participated in the attack and those who pose a continuing threat to the United States.'[287]

How this 'self-defence' translated into a 'War on Terror' remains legally problematic. The 1949 Geneva Conventions do offer two possible understandings of 'armed conflict' for our purposes- namely Article 2, as a conflict existing between 2+ Geneva Convention High Contracting Parties, where a war has been declared between the parties.[288] Such situations are usually reserved for inter-state conflicts, and thus provide the legal basis for conventional war. The second category, as per Article 3, describes armed conflicts which are 'not of an international character, occurring in the territory of one of the High Contracting Parties'.[289] Pivotally, those 'armed conflict' which come within the scope of Article 3 largely lay outside the scope of the Geneva Conventions- although they 'must treat persons not taking an active part in conflict, including sick, wounded, surrendering and detained fighters, humanely. Specifically, murder, mutilation, cruel treatment and torture are prohibited.'[290] The most fundamental difference between Articles 2 and 3 lay in the fact that 'lawful combatants' involved in Article 2 'conventional wars' are afforded prisoner of war status, which in its simplest form protects combatants from being tried for their conduct by the opposing state. Article 3 combatants do not provide for such protections- as such 'insurgents, revolutionaries, and other unconventional forces do not necessarily enjoy this same protection from prosecution'.[291] As

[287] Peter L. Hickman II, 'The Lore of the Laws of War: Textual Constructions of Archetypal Identities in the War on Terrorism' (Dissertation, Arizona State University, ProQuest, April 2014) p. 25.
[288] 1949 Geneva Convention, Common Article 2.
[289] 1949 Geneva Convention III, Common Article 3.
[290] Cited in: Peter L. Hickman II, 'The Lore of the Laws of War: Textual Constructions of Archetypal Identities in the War on Terrorism' (Dissertation, Arizona State University, ProQuest, April 2014) p. 28.
[291] *Ibid.* p. 29.

terrorist groups are not High Contracting Parties to the Geneva Conventions, they thus cannot come within the remit of Article 2, conventional warfare, and thus are forced to come in line with Article 3. States have worked around these legal distinctions in the wake of 09/11, in order to extend their jurisdiction into other states, and combat terrorist threats.

'So called "extraterritorial law enforcement" using military force to fight terrorists operating on the soil of another country has gained some limited international legal recognition particularly since 2001. With the host government's consent, another state can use military force as a tool of counter terrorism, outside its borders, in what is technically a law enforcement action.'[292]

It is debatable whether a 'War on Terror' is capable of coming within the remit of Article 3, or whether the terrorist groups are 'not sufficiently organised' and the attacks 'not lengthy in nature' and thus can only be characterised in terms of criminal law.[293] With the ambiguity of the common enemy of 'international terrorism', concerning neither an Article 2 High Contracting Party, nor an Article 3 non-international conflict, the 'War on Terror' largely fell into a legal grey area, in the international terrain. The ambiguity of the conflict in general and its nature has rendered those involved largely unprotected.

Hindered further by a problematic distinction between 'combatant' and 'civilian', states have struggled to decipher who is indeed affiliated with terrorist groups, and thus which category individuals fall into. Article 43 of the Additional Protocol I to the 1949 Geneva Conventions defines 'combatants' as: 'members of the armed forces of a Party to a conflict are combatants…they have the right to participate

[292] *Ibid.* p.29.
[293] *Ibid.*p.30.

directly in hostilities.'[294] Membership to terrorist groups is likewise an ambiguous interpretation, and thus who falls inside and outside the scope of prisoner of war protections, and who can hide behind the mask of 'civilian' protections has become blurred.

International humanitarian law is largely considered to be of universal applicability. However, what has become clear is that although states have attempted to create legal vacuums to counteract terrorism, the international legal stance in its simplest form remains clear:

> *'every person in enemy hands must have some status under international law: he is either a prisoner of war and, and as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel or the armed forces who is covered by the First Convention. There is no intermediate status: nobody in enemy hands can be outside the law.'*[295]

Fundamentally, although exceptionalism may be commonly-depicted as a legal vacuum, wherein law is rendered null and void, in many cases these exceptional spaces are actually facilitated and legitimised by an abundance of law. The need to legitimise and justify actions during exceptional periods showcases how states do in fact rely upon law and legitimacy in order to implement their policies. It is this fiction that a legal vacuum exists which strengthens their exceptional mandate. However, in reality, there is a continuing need to legitimise all decisions and measures, even if states do not wish for people to be aware of this. At the crux, therefore, is the pursuit of legitimacy. We must grant the international legal sphere

[294] Additional Protocol I, 1949 Geneva Conventions, Article 43.
[295] Jean Pictet, ed. 'Commentary, IV Geneva Convention'. Cited in: Peter L. Hickman II, 'The Lore of the Laws of War: Textual Constructions of Archetypal Identities in the War on Terrorism' (Dissertation, Arizona State University, ProQuest, April 2014) p. 52.

the tools to pierce the façade of exceptional, seemingly lawless spaces through challenging the legitimacy of states and their leaders.

Chapter 4: Category (3) Crises: 'Struggles for Power Beyond the Boundaries of Ordinary Politics'[296]

'The Constitution is designed to keep political disagreements- including disagreements about the Constitution's proper interpretation- within the bounds of normal politics. In type (3) crises, the Constitution fails at this task, and one or more of the parties moves outside the ordinary boundaries of politics in an effort to win.'[297]

According to the aforementioned Balkin and Levinson, a category (3) crisis prevails in a situation of overhaul- times of revolution and protest. All of the relevant actors may indeed allege that their actions and powers are in-keeping with the constitution of said state, but these various actors ultimately disagree about what the constitution grants each actor in terms of power. It is effectively a power struggle over the interpretation of the constitutional arrangements of a state. With no side admitting defeat, a stalemate ensues and the constitutional crisis emerges, as the battle often takes to the streets, instead of the courtroom.

'*In type (3) crises, each side may claim that their opponents are violating the Constitution or are wrongly preventing lawful action under it…each side may*

[296] Sanford Levinson, Jack Balkin,'Constitutional Crises' *University of Pennsylvania Law Review* (February 2009) Vol. 157 (3) Available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1017&context=fss_papers Last accessed July 2017.
[297] *Ibid.* p.739.

accuse the other of tormenting a type (1) crises, while simultaneously claiming impeccable legal pedigree for its own actions.'[298]

Referring back to Moncef Marzouki's proposed mandate for an IConC, he identified two areas which could be confronted by an international constitutional institution, arising from a category (3) crisis. Namely, in situations where unconstitutional actions by the executive spark revolutions and protest, which are capable of proving violent and illegal in themselves, and also where corrupt or illegal elections have taken place in order to secure the continuation of an authoritarian executive which would otherwise not freely and democratically gain the popular vote. In such circumstances, struggles for power ensue. With regard to the former, as we will witness in our analysis, 'people power' is often a powerful tool in confronting unconstitutional executive power and resuming 'normalcy'. Yet, in the latter, illegitimate or illegal elections prove more burdensome to combat as they are often plagued by secrecy and corruption, which renders it difficult, if not impossible to evidence. Resultantly, regulation and oversight by an international institution could bolster and support 'people power' by investigating the legitimacy of an election.

I. People Power and Protest

'Mass demonstrations, coupled with credible threats to take to the streets and commit mass civil disobedience…might also be signs of a type (3) constitutional crisis.'

[298] *Ibid.* p.738.

A. Iceland's 'Pots and Pans' Revolution

In the aftermath of the financial crisis of 2008, the 'pots and pans' revolution, or 'kitchenware revolution' was sparked in Iceland, a nation with a small population of 311,000 people. [299] The government's reaction to this economic crisis was to nationalise the nation's 3 main banks, which led to a plummeting stock market crash, and a concurrent crash in the people's trust of the government. Civil society mobilised and organised themselves into weekly demonstrations, which were held outside of the parliament building, and after 5 months, eventually the demands of the people were met and resignations seen from the government, the head of the Central Bank and the Director of the Financial Supervisory Authority.[300]

Before long, the newly-emerged coalition government had created investigatory bodies with the authority to prosecute bankers and government officials, and this resulted in the prosecution of numerous of Iceland's top bankers under the crimes of insider trading etc., these individuals served up to 5 years in prison. [301] The court which adjudicated the case of the previous Prime Minister, Geir Haarde, was more lenient and found him guilty of 'neglecting to hold special meetings to address a crisis that many could see coming.'[302]

[299] Birgitta Jonsdottir, 'Lessons from Iceland: The People Can Have the Power' (15 November 2011, The Guardian) Available at: https://www.theguardian.com/commentisfree/2011/nov/15/lessons-from-iceland-people-power Last accessed July 2017.
[300] Philip England, 'Iceland's "Pots and Pans Revolution": Lessons from a Nation that People Power Helped to Emerge from its 2008 Crisis All the Stronger' (28 June 2015, The Independent) Available at: http://www.independent.co.uk/news/world/europe/icelands-pots-and-pans-revolution-lessons-from-a-nation-that-people-power-helped-to-emerge-from-its-10351095.html Last accessed July 2017.
[301] *Ibid.*
[302] *Ibid.*

The Icelandic people determined whether to nationalise banks, prosecute bankers, impose controls on moving capital abroad and held 2 referenda on the question of whether or not Iceland should pay back foreign debtors. In 2015, the IMF praised Iceland as 'one of the top economic performers in Europe over the past few years in terms of economic growth'-[303] so we can safely say that the approach of the Icelandic people worked in stabilising their own economy, and mapping their own path out of a crisis situation. Having firmly established their power in bringing about economic reforms, the people fearlessly shifted their attention towards striving for democratic reforms, quoting the logic:

'why treat the symptoms of a system that has become corrupt when you can tackle the disease itself?'[304]

Thus, in 2010, Parliament created a process through which citizens were able to collectively participate in writing the Icelandic Constitution. This project brought about a peoples' assembly of 950 randomly-selected citizens who outlined the key foundational principles of said constitution, coupled with experts of constitutional law being asked to write a guidance booklet. A group of 25 elected citizens were then given the momentous task of drawing up the new constitutional document- a project which took 4 months to complete. [305] The document was published at all stages of the drafting process, to allow for the comments and feedback from citizens throughout the process. In this way, a constant dialogue was in place to ensure that the constitutional document reflected the will of the people throughout. In the

[303] *Ibid.*
[304] *Ibid.*
[305] Zachary Elkins, Tom Ginsburg, James Melton, 'A Review of Iceland's Draft Constitution' (The Comparative Constitutions Project, 14 October 2012) Available at: http://comparativeconstitutionsproject.org/wp-content/uploads/CCP-Iceland-Report.pdf Last accessed July 2017.

national referendum which followed in 2012, 67% of citizens voted in favour of using this document as the basis for a new constitution.

Although, such active engagement of civil society in the construction of their constitution in Iceland is commendable, and paints a clear picture of the power of an active and engaged civil society in a state, in the wake of a category (3) crisis- this constitutional document is yet to be passed by Parliament. But the exercise itself and the precedent it establishes is a powerful one in terms of constitutional protections, and the checks that are capable of being maintained by civil society in times of crisis:

'Iceland's Constitution-making process has been tremendously innovative and participatory…it would also be at the cutting edge of ensuring public participation in ongoing governance, a feature that we argue has contributed to constitutional endurance in other countries.'[306]

In 2016, we saw the Icelandic people again take to the streets over the refusal of the Prime Minister, Gunnlaugsson, to step down from his position after it was leaked that he had failed to disclose assets and allegations of corruption were rife.[307] As a result, a new government was appointed and the voices and will of the people reigned supreme once more. [308] Though this showcases a positive response to a constitutional crisis by civil society in Iceland, if aided by an international institution, their carefully-crafted constitution might have been implemented.

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[306] *Ibid.* p.11.

[307] Jesselyn Cook, 'Thousands Protest in Iceland After Prime Minister Refuses to Step Down' (4 April 2016, Huffington Post) Available at: http://www.huffingtonpost.com/entry/iceland-protests-panama-papers_us_5702a58ee4b0a06d58064555 Last accessed July 2017.

[308] Alex Elliott, 'Iceland Political Crisis: The Latest' (8 April 2016, Iceland Review) Available at: http://icelandreview.com/news/2016/04/08/iceland-political-crisis-latest Last accessed July 2017.

B. The Republic of Korea: The Relentless Flickers of Candlelight

'Just as there can be emergency without a constitutional crisis, constitutional crises can occur in contexts that no one would identify as emergencies…when a governor disgraced by scandal or duly impeached and convicted refuses to leave office.'[309]

Following mass demonstrations outside of the Blue House, the residence of Former President Park Geun-hye, on a weekly basis in Seoul over the course of months, her eventual impeachment resulted in early 2017. Catalysed by an initial scandal which shocked the South Korean people in 2016, with regard to the Former President's relationship with Choi Sooon-sil, who had been investigated on suspicion of exerting undue influence on Park Geun-hye,[310] the people had demanded that she step-down as President. Despite public apologies being made, she refused to resign from her position. In late November 2016, at the height of the protest figures, it has been estimated that 1.5 million people attended protests in Seoul, alongside a further 400,000 in other regions of the country.[311] The police forces, largely comprised of young males undertaking their mandatory military

[309] Sanford Levinson, Jack Balkin,'Constitutional Crises' *University of Pennsylvania Law Review* (February 2009) Vol. 157 (3) p. 718. Available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1017&context=fss_papers Last accessed July 2017.

[310] Justin McCurry, 'South Korea Impeachment Vote: The Key Facts Behind a Presidential Crisis' (The Guardian, 9 December 2016) Available at: https://www.theguardian.com/world/2016/dec/09/south-korea-impeachment-vote-the-key-facts-behind-a-presidential-crisis Last accessed July 2017.

[311] 'South Korea Sees Largest Protests Against President Park Gyeun-hye' (BBC News, 26 November 2016) Available at: http://www.bbc.com/news/world-asia-38114558 Last accessed July 2017.

service, were enlisted to defend the Blue House against protestors and prevent any potential violence.

During this period of protests, President Park Geun-hye's approval rating dropped to 5%, amidst constant pressure from citizens to step down.[312] The Constitution in South Korea protects sitting presidents from being prosecuted, and her presidential term had a remaining 15 months before it was to expire. With Prosecutors directly linking her to the corruption scandal, it raised the possibility of her impeachment through constitutional channels.

In December 2016, a bill was passed in the National Assembly of South Korea to impeach Park Geun-hye, with 234 votes in favour, to 56. Such a result was a sure indicator of the loss of confidence that had resulted from the scandal, even among her own conservative Saenuri Party. The bill required a minimum of 200 votes in favour of initiating impeachment proceedings in order for the issue to be passed to the Constitutional Court to rule on the issue and render a decision.[313] The fate of her presidency was thus in the hands of the 9 constitutional court judges, all of whom she had elected to the court bench, and many believed would be unlikely to decide to impeach her. The impeachment decision was passed down and Park Geun-hye did indeed leave office.[314] In the May 2017 presidential election which followed, the people overwhelmingly elected a former human rights lawyer, who firmly opposed her leadership, namely Moon Jae-in.[315] Prior to his election, he notably served the

[312] *Ibid.*

[313] Constitution of the Republic of Korea (1948), Article 65. Available at: http://korea.assembly.go.kr/res/low_01_read.jsp Last accessed July 2017.

[314] Justin McCurry, 'Park Geun-hye: South Korean Court Removes President Over Scandal' (The Guardian, 10 March 2017) Available at: https://www.theguardian.com/world/2017/mar/10/south-korea-president-park-geun-hye-constitutional-court-impeachment Last accessed July 2017.

[315] 'Moon Jae-In: South Korean Liberal Claims Presidency' (BBC News, 9 May 2017) Available at: http://www.bbc.com/news/world-asia-39855956 Last accessed July 2017.

warning to the judges in the constitutional court, 'that overturning an impeachment vote would be a betrayal of the South Korean people.'[316] This election result showcases the swing in popular opinion back to liberal and democratic values, after a period of political disarray- President Moon Jae-in epitomises a newfound unity in the South Korean people.

> '*The scandal has further exposed the unhealthy ties between establishment politicians and the country's conglomerates. That arrangement was largely tolerated while the chaebol spearheaded rapid growth in the South Korean economy- Asia's fourth-biggest- but the rising income gap, youth unemployment and high-profile problems affecting Samsung and other major companies, means voters' patience is wearing dangerously thin.*'[317]

Not only will this impeachment and the struggle of the South Korean people to bring about the demise of a figure who was once widely trusted and respected by the citizens, on account of her father, President Park Chung-hee, and his legacy, go down in history, it will also be remembered in how it angered the people to such a degree that they took to the streets in defiance, weekly, armed with their flames of solidarity.

In April 2017, prosecutors formally charged Park Geun-hye on grounds of corruption, which could potentially give her a life sentence in jail. The charges included abuse of power, extortion, bribery and leaking state secrets.[318] This former

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[316] *Ibid.*

[317] Justin McCurry, 'South Korea Impeachment Vote: The Key Facts Behind a Presidential Crisis' (The Guardian, 9 December 2016) Available at: https://www.theguardian.com/world/2016/dec/09/south-korea-impeachment-vote-the-key-facts-behind-a-presidential-crisis Last accessed July 2017.

[318] 'Former South Korean President Facing Possible Life Sentence' (Associated Press, The Guardian, 17 April 2017) Available at:

President, who many claim has fallen from grace, both in terms of legitimacy and in the hearts and minds of many South Korean citizens, was motorcaded out of the Blue House in March 2017, she broke her longstanding silence, in stating:

'I feel sorry that I could not finish the mandate given to me as president…it will take time, but I believe the truth will be revealed.'[319]

Mapping the statistics of those who participated in the protests from October to December 2017, the figures are quite startling in how quickly the movement mobilised. With the initial protest seeing figures of approximately 30,000 people on 29 October 2016, by 3 December 2016 the numbers of protestors had risen to 2,320,000-[320] myself being one of them.

Most poignantly of all, the impeachment scandal showcases the emancipation of the South Korean people and tells the tale of voices which have long been quiet and subservient in the political domain, arguably since the pro-democracy movements in the 1980's- their voices reverberated with grace, strength and a steadfast commitment to peaceful protests in the interests of democracy, justice and the rule of law.

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https://www.theguardian.com/world/2017/apr/17/former-south-korean-president-park-geun-hye-facing-possible-life-sentence Last Accessed July 2017.

[319] 'South Korea: Park Geun-hye Breaks Silence as She Leaves Official Residence' (Reuters, The Guardian, 12 March 2017) Available at: https://www.theguardian.com/world/2017/mar/12/south-korea-presidential-frontrunner-stresses-need-to-embrace-north Last accessed July 2017.

[320] Youngsu Won, 'South Korean Candle Light Protest 2016' (9 December 2016) Available at: http://www.europe-solidaire.org/spip.php?article39695 Last accessed July 2017.

C. The Republic of Tunisia & The Arab Spring(s)

'Political actors believe that their opponents are taking dangerous and illegal steps that endanger the constitutional foundations of the republic or that threaten to bring about fundamental and unjustified changes. Therefore, these steps justify- and generally produce- extraordinary forms of struggle and opposition that go outside the realm of ordinary political jostling and political brinkmanship.'[321]

Often, we can observe how a category (1) crisis is capable of spiralling into a category (3) crisis- arguably it is just such a sequence of events which catalysed 'The Arab Spring[s]'. Where authoritarian leaders and dictatorships have brought about widespread human rights violations, with alleged 'exceptionalism' argued as the justification for doing so, the people revolt, and in so doing, spark a constitutional crisis in a different form.

'The Middle East and North Africa was engulfed in an unprecedented outburst of popular protests and demand for reform. It began in Tunisia and spread within weeks to Egypt, Yemen, Bahrain, Libya and Syria.'[322]

On 17 December 2010, the self-immolation of Mohamed Bouazizi catalysed widespread protests amongst the frequently divided Tunisian people:

[321] Sanford Levinson, Jack Balkin,'Constitutional Crises' *University of Pennsylvania Law Review* (February 2009) Vol. 157 (3) p. 739. Available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1017&context=fss_papers Last accessed July 2017.

[322] 'The Arab Spring: Five Years On' (Amnesty International) Available at: https://www.amnesty.org/en/latest/campaigns/2016/01/arab-spring-five-years-on/ Last accessed July 2017.

unemployment was high; there was widespread corruption, restrictions on human rights (especially freedom of speech), poor living conditions and food inflation. This one event brought about an unimaginable ricochet of social disorder and political unrest, which would transcend state borders, political and religious loyalties. The result, for Tunisia at least, was the removal of Former President Zine El Abidine Ben Ali in January 2011, just 28 days after the death of Bouazizi. The deeply-felt frustration with the economic policies of Tunisia, the repression of its citizens and their human rights and an ongoing distrust of the political elite brought about social unrest on a dramatic scale. For many Tunisians,

'*the fabric of Ben Ali's authoritarianism [had] frayed. Once it became clear that the Islamists no longer posed a serious threat, many Tunisians became less willing to accept the government's heavy-handedness.* '[323]

Considering the origins of Former President of Tunisia, Moncef Marzouki, with regard to the dictatorship which took hold of Tunisia under President Ben Ali, it seems inevitable that in order to fully understand his proposal for an IConC and the backdrop within which it was constructed, we must first understand Tunisia and its own experience of 'crises'. It is worthy of note that the Arab Spring which has brought about a vast restructuring of power in the Middle East was, as previously stated, catalysed by events in Tunisia.[324] In a conversation with Moncef Marzouki in 2013, Presider Christopher Dickey (Paris Bureau Chief and Middle East Regional Editor, Newsweek) remarked:

[323] Christopher Alexander, 'Tunisia's Protest Wave: Where it Comes from and What It Means' (3 January 2011, Foreign Policy) Available at: http://foreignpolicy.com/2011/01/03/tunisias-protest-wave-where-it-comes-from-and-what-it-means/ Last accessed July 2017.

[324] 'The Arab Spring and International Constitutionalism: A Conversation with Mohamed Moncef Marzouki' (25 September 2013, Council on Foreign Relations) Transcript Available at: http://www.cfr.org/tunisia/arab-spring-international-constitutionalism/p35507 Last Accessed July 2017.

'The Arab Spring looks- well, looks like hell in a lot of countries. I had the feeling that sometimes when I look at what happened in Tunisia, it's a little bit like…Slovenia in the Balkans, they broke away from Yugoslavia, came away more or less safe and sound, and everything else fell apart and went to hell.'[325]

Moncef Marzouki went on to explain, however, that Tunisia remains far from safe from further crises, given the fact that its neighbours include Egypt and Libya- both of which in recent years have witnessed their fair share of human rights violations and 'constitutional crises'. In a world of interconnected states, it certainly seems as though no problem is merely domestic in nature anymore- this is perhaps the by-product of globalisation. Globalisation has brought both advantages and difficulties. In such a way, he draws upon the interaction between Syria and Tunisia, and the impact that a crisis in the former has had on the latter:

'Syria is becoming an internal problem [to Tunisia], because we have a lot of young people going to Syria, more than 500 jihadis, Tunisian, 500 Tunisian jihadis are in Syria and we're very afraid that, when they come back to Tunisia, it will be the same thing that happened with Algeria…in the 80's, a lot of Algerians went to Afghanistan and then they come to Algeria, and this was the beginning of hell in Algeria.'[326]

Even Tunisia, which was heavily westernised under Former President, Habib Bourguiba, which has been at the forefront of fighting for women's rights etc., its fate post-revolution is still far from 'safe' or clear. Post-revolution in Tunisia, then President Moncef Marzouki pledged loyalty to finding 'consensus', a commitment to dialogue between the government and the people; although he admits that it takes time for this to be realised, the reality, if they fail to reach this consensus, is a crisis

[325] *Ibid.*
[326] *Ibid.*

akin to the one we saw ensnare Egypt. He highlights the power of having a strong civil society, an educated and professional populace, without which the state would be 'helpless' and vulnerable to crises in facing its threats.[327]

In drawing up the most recent Constitution in Tunisia in 2013, the process was fraught with numerous political assassinations in an attempt to stall the process and in so doing Tunisia's transition toward a fully-fledged democracy. Moncef Marzouki has explained how in Tunisia, political assassinations were the only way in which individuals could stall the system, as a coup would not be possible on account of the 'specificity of our military'.[328]

He draws an interesting parallel which perhaps goes some way to explain why we saw a shift from crises caused by Al-Qaeda to those caused by civil society in the Arab Springs in numerous Arab states. In conveying how the onset of the Arab Spring meant that Al-Qaeda's primary mandate of overcoming dictatorships was replaced by largely democrats who aimed to overthrow the same dictatorships, but through civil society and with no religious label attached to themselves- it rendered Al-Qaeda's purpose largely futile, so they changed it.[329] Resultantly, Al-Qaeda in recent years has fought to halt or stall political processes and with this has come a resurgence of an extremist Islamist movement. It is such a change in dynamics that has brought about the crises we have seen in the Syrian Arab Republic.

Importantly though, after a revolution a counter-revolution usually results, arguably a by-product of a transitioning state- and thus one crisis is usually followed by another, albeit it in a different form. He explains how in the context of Tunisia, the revolution and the fleeing of the dictator Ben Ali did not result in every citizen

[327] *Ibid.*
[328] *Ibid.*
[329] *Ibid.*

accepting the new regime.[330] Many citizens had indeed been content with the previous regime, and upon witnessing the crisis in Egypt would probably have aimed to recreate that crisis in Tunisia- but as we have previously stated, failing states fail in their own way, crises cannot be reproduced uniformly in different states. Moncef Marzouki reiterates how we should not be referring to the crises we see in many Arab states as an 'Arab Spring'- individual crises warrant a multiplicity in crises, thus a more accurate definition would be 'Arab Springs'.[331]

The side-effect of a counter-revolution has meant, in the context of Tunisia, that many of the rights and freedoms which the current regime fought hard for, are now being used against them by their predecessors. In a traditional and conservative society such as Tunisia, it is often difficult to balance the protection of human rights, political stability and religious sentiment and law. One could write an entire paper on the compatibility of human rights in non-secular states, where a religious law, for example Shari'ah, sometimes conflicts with, or even contravenes human rights.[332] Though such a discussion is wholly relevant to the arguments herein, for fear of the over-expansion of my paper, I will refrain from analysing too deeply here.

The compromise established between Islam and the Tunisian coalition government was to refrain from inputting 'Shari'ah' into the Constitution after the revolution- as it was deemed potentially harmful to the stance therein on women's rights and human rights as a whole. But ensuring the construction of a secular constitution was of course problematic; Moncef Marzouki distinguishes between a Muslim country and having a secular constitution in explaining that the former is an issue of identity,

[330] *Ibid.*
[331] *Ibid.*
[332] Loveland (2009) Cited in: Laith K. Nasrawin, 'An International Constitutional Court: Future Roles and Challenges' *Digest of Middle East Studies* Vol. 25 (No 2) (2016) p. 219.

and the latter relates to something more universal.[333] If we translate this to the international domain, we can identify how we are capable of having individual state identities, religions, cultures etc., but our constitutions should be universal in nature, as they are inherently 'universal values'. It is this central idea of the uniformity of constitutional human rights protections which we advocate for later in this paper.

Most poignantly, Moncef Marzouki highlights the tools which have been used in Tunisia to aid their progression toward democracy and a greater protection for human rights- these tools are capable of being translated into the international sphere and assisting our realisation of an IConC. In this way, he suggests that writing a constitution is not in itself the only remedy to a 'crisis' situation- 'writing the constitution is not…what will guarantee this…it's a strong statement'.[334] Alongside this, 'we need a strong civil society and we need strong organisation…in Tunisia, we were very lucky to have that'.[335] Although his statement was in reference to Tunisia's progress, it is wholly capable of being transposed into our construction of an International Constitutional Court.

Although Tunisia's transition to a largely democratic state has proven a resounding success, considering it was sparked by one local event, the self-immolation of a fruit-stall trader. For many other Arab states, whose histories had been similarly tainted by authoritarian leaders and repressive policies and restrictions on human rights, crisis (1) situations, the people had:

[333] The Arab Spring and International Constitutionalism: A Conversation with Mohamed Moncef Marzouki' (23 September 2013, Council on Foreign Relations) Transcript Available at: http://www.cfr.org/tunisia/arab-spring-international-constitutionalism/p35507 Last Accessed July 2017.
[334] *Ibid.*
[335] *Ibid.*

'Hoped that this "Arab Spring" would bring in new governments that would deliver political reform and social justice. But the reality is more war and violence, and a crackdown on people who dare to speak out for a fairer, more open society.'[336]

Perhaps this serves as proof that all failing states, fail in their own way; one uniform approach translated across diverse states will not prove effective in the long-run. This has largely been the difficulty found by the international community in dealing with the issues raised by the Arab Spring[s], and should be borne in mind as we pursue a new international legal framework.

II. Silenced Voices & Illegitimate Elections

At the very crux of executive power is the central understanding that said power is derived from the electorate and popular opinion, and is inherently legitimised by them. Resultantly, an unconstitutional election strikes at the very essence of democracy and legitimacy, often leading to the prolonging of an authoritarian regime and their unconstitutional policies. We increasingly can witness the desperate attempts made by authoritarian leaders to maintain their grasp of power by using: incentives to bribe voters, fear or intimidation tactics to ensure that voters cast their ballot in a certain way either prior to the election or at the polling station, the rigging or hacking of election results and figures and the suppression of opposition parties to ensure choice is limited.

[336] The Arab Spring: Five Years On' (Amnesty International) Available at: https://www.amnesty.org/en/latest/campaigns/2016/01/arab-spring-five-years-on/ Last accessed July 2017.

A. Legitimising Illegitimacy: International Authoritarianism in Haiti

'It is impossible to build a legitimate government on a rotten foundation.'[337]

It is worthy of note that the notion of the international community regulating national elections according to international constitutional law is contentious, as it potentially compromises the sovereignty of states, especially if the people therein have not consented to such intervention. Such intervention has been witnessed in recent years with the increasing guardianship of Haiti, including overseeing its elections. In the presidential election of November 2010, only ¼ of Haitians voted, largely on account of the most popular political party, Fanmi Lavalas, being excluded from the ballot paper.[338] Resultantly, the Organisation of American States (OAS) decided to pursue a run-off election between the top 2 presidential candidates. Even though the international organisation may have believed it was coming to the aid of a developing and troubled state, there were many inherent issues with the legitimacy of Haiti's election to begin with, and thus recognising its result seems unjustifiable. Instead of going to the root of the issue and trying to build better mechanisms in order to strengthen Haiti's democratic electoral process, legitimising an illegitimate electoral result merely weakens Haiti's position even more. Alongside the exclusion of a popular political party in

[337] 'Haiti Deserves a Legitimate Election', (The New York Times, Sunday Review, 12 December 2015) Available at: https://www.nytimes.com/2015/12/13/opinion/sunday/haiti-deserves-a-legitimate-election.html?_r=0 Last accessed July 2017.

[338] Mark Weisbrot, 'OAS Backs Illegitimate Election in Haiti in Which Three-Quarters of Haitians Didn't Vote' (The Guardian Unlimited, 10 January 2011) Available at: http://cepr.net/publications/op-eds-columns/oas-backs-illegitimate-election-in-haiti Last accessed July 2017.

the 2010 election,[339] 'our recount of the vote also showed that even among the votes cast, there was a sizeable proportion of votes- about 12.7%- that were never received by the Provisional Electoral Council or were quarantined by it,' clerical errors were rife on tally sheets, 'ballot box stuffing and fraud' commonplace and many were unable to vote because they did not appear on the electoral register.[340]

> *'Clearly an election that was so severely flawed and plagued by irregularities cannot be considered legitimate.'*[341]

Through the international community choosing to legitimise the illegitimate, this fundamentally undermines the Haitian people's right to vote and provides a volatile foundation upon which said government can govern, leaving the situation open to possible protest, or even revolution. The 2010 election was not merely formally endorsed internationally, despite its flaws, it was in fact funded by international donors who supplied $12.5 million (72% of the election cost).[342] Importantly, this was not the first occasion where international intervention crippled national elections in Haiti. The democratically-elected President, Jean Bertrand Aristide,

[339] The Haitian Constitution states that political parties 'may be established and may carry out their activities freely', *Constitution* (1987), Article 31. *The Electoral Law* (2008) governs the electoral procedures, and merely requires candidates to provide an affidavit establishing the political party, per Article 94(1).

[340] Mark Weisbrot, 'OAS Backs Illegitimate Election in Haiti in Which Three-Quarters of Haitians Didn't Vote' (The Guardian Unlimited, 10 January 2011) Available at: http://cepr.net/publications/op-eds-columns/oas-backs-illegitimate-election-in-haiti Last accessed July 2017.

[341] *Ibid.*

[342] Institute for Justice and Democracy in Haiti, 'Haiti's November 28 Elections: Trying to Legitimize the Illegitimate' (IJDH, 22 November 2010) p.3. Available at: http://ijdh.org/wordpress/wp-content/uploads/2010/11/Election-Report-11-23-2010.pdf Last accessed July 2017.

elected in 2004, was overthrown by a coup aided by the US and exiled in clear violation of both Haitian constitutional law and international law.[343]

'Washington and its allies, including the people who are currently making decisions about Haiti at the OAS, are pushing these illegitimate elections for the same reason that they overthrew Aristide, and will not let him back into his own country…these people want to determine who rules Haiti, without allowing the majority of Haitians themselves to decide. There will be resistance to this, as to the dictatorships and foreign occupations of the past.'[344]

In 2015, the electoral crisis in Haiti once again marred the legitimacy of government and the sovereignty and stability of Haiti as a whole, with new allegations of 'ballot tampering, illegal voting and other abuses', alongside a 26% voter turnout. [345] Instead of accepting the illegitimacy of yet another election, independent inquiries should be undertaken to understand where the democratic electoral process in Haiti is continually going awry. Since the 2010 Haitian earthquake, the Haitian people have struggled to rebuild their political institutions; there is a growing distrust and apathy toward international intervention and oversight, as it certainly appears as though the stability and best interests of the Haitian people are not at the forefront of the minds and intentions of those acting on their behalf. In 2015, with a disbanded parliament, and a leader who was ruling by decree, the political situation of Haiti was dysfunctional to say the very least.

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[343] Mark Weisbrot, 'OAS Backs Illegitimate Election in Haiti in Which Three-Quarters of Haitians Didn't Vote' (The Guardian Unlimited, 10 January 2011) Available at: http://cepr.net/publications/op-eds-columns/oas-backs-illegitimate-election-in-haiti Last accessed July 2017.

[344] *Ibid.*

[345] 'Haiti Deserves a Legitimate Election', (The New York Times, Sunday Review, 12 December 2015) Available at: https://www.nytimes.com/2015/12/13/opinion/sunday/haiti-deserves-a-legitimate-election.html?_r=0 Last accessed July 2017.

If an IConC was to be constructed with a mandate which included oversight of elections and their legitimacy, perhaps the plight of Haiti, and their shackled existence to the authoritarian wishes of their puppeteers might be finally resolved. The case of Haiti is an important one, as it showcases how international oversight can, if maliciously pursued, be harmful to democratic processes and undermine state sovereignty and electoral legitimacy. An IConC would be equipped to denounce illegitimate elections, guide electoral processes and offer assistance where needed.

'Anyone who cares about democracy in a country whose fate is so closely tied to the wandering and sometimes malign attentions of the United States and the rest of the world should pay attention. ***Haitians deserve better than this****.'*[346]

B. The Russian Federation: 'The Rubber Stamp' of Electoral Legitimacy

Amidst a state which entrusts centralised power to a Presidential figure in the political sphere, the importance of a constitution which ensures democratic accountability and legitimate elections could not be over-stated. The most prominent example in recent years has proven to be Russia. Is the re-election of President Putin a result of evidenced popular support from the Russian electorate, or the result of an authoritarian constitution and policies which allow for, and formally legitimises, his continued grasp on power?

'Under the influence of Vladimir Putin, the Russian political system has become highly centralised, with particular emphasis on the 'power vertical', a top-down

[346] *Ibid.*

approach that serves the interests of the power elite. The security services are arguably more powerful than they were under the communist system…the television mass media are effectively controlled by the government…journalists are intimidated from carrying out any serious investigative reporting. [347]

Although constitutional guarantees are claimed to exist to ensure that free and fair elections do take place formally, as per the 1993 Constitution, [348] the reality is an engineered mechanism which ensures that power remains in the hands of authoritarian figures with similar agendas, albeit different labels. Legislation has been consistently enacted to raise the hurdles even higher for smaller parties who wish to enter the political sphere and contest the dominant leadership. For example, in the 2008 presidential election, only 4 candidates were able to register with the Central Election Commission, one of the potential candidates was refused registration because he could not rent a venue for a political meeting, which had become a prerequisite for registration.[349]

Another example of the suppression of opposition groups centres on the registration of former Prime Minister Mikhail Kasyanov, who was the leader of the People's Democratic Union. Although at first registered, the Central Election Commission later withdrew his registration for candidacy, claiming that a large number of

[347] The EU-Russia Centre Review, 'The Electoral System of the Russian Federation', (EU-Russia Centre, Issue 17, April 2011) pp.4-5. Available at: http://www.eu-russiacentre.org/wp-content/uploads/2008/10/Review17.pdf Last accessed July 2017.
[348] Article 81, Constitution of the Russian Federation (1993). Cited in: William Partlett, 'The Constitutionality of Vladimir Putin's Third Term' (Brookings, 9 March 2012) Available at: https://www.brookings.edu/opinions/the-constitutionality-of-vladimir-putins-third-term/ Last accessed July 2017.
[349] The EU-Russia Centre Review, 'The Electoral System of the Russian Federation', (EU-Russia Centre, Issue 17, April 2011) p.8. Available at: http://www.eu-russiacentre.org/wp-content/uploads/2008/10/Review17.pdf Last accessed July 2017.

signatures of support for his party were deemed to be 'forged'-[350] however, his attempts to appeal this decision to the Supreme Court were curtailed.

'Since Vladimir Putin became President there has been increasing international criticism of the conduct of Russian elections…various international human rights organisations were very critical about elections that took place in 2007 and 2008. On 28 February 2008 Amnesty International published a report in which it expressed its concerns relating to the exercise of the rights of freedoms of expression, association and assembly in the Russian Federation.'[351]

The electoral system as it currently stands in Russia is tainted by corruption and a powerful elite which retain control of the political sphere, shifting hands occasionally to 'rubber-stamp' the legitimacy requirement of elections, but failing to provide substantive safeguards to ensure free and fair elections. Challenges to power structures are largely futile, resulting in an apathetic populace who have lost trust in the electoral process, and are increasingly accepting of the authoritarian regime which refuses to loosen its grip and continues a relentless and effective information campaign to portray strength and solidarity. An alternative avenue for international oversight of Russia's elections is necessary to counter this and encourage their path toward democracy and greater-legitimacy and integration on the world stage.

[350] *Ibid.* p. 8.
[351] *Ibid.* p. 28.

C. Existing International Oversight

In the wake of the Cold War in particular, international organisations have recognised the importance of developing strong and effective democratic foundations in domestic settings. The need for legitimate and democratically-elected governments has been widely-acknowledged to be foundational in international law, and yet many countries have flailed in their progress. An entire community of international election observers has been created to promote these foundations, and yet their powers are often criticised for being weak and the overarching standards which they assert, rendered vague. The work of the Office for Democratic Institutions and Human Rights of the Organisation for Security and Cooperation in Europe (OSCE-ODIHR) has stood at the forefront of European efforts to promote and advance democratic processes. In 2005, the Declaration of Principles for International Election Observation and the Code of Conduct for Election Observers were advanced by the UN. [352] These documents provide guidance on what constitutes a credible election, but are largely silent on defining 'genuine democratic elections' and remains broad in its guidance.[353] International legal commentators have highlighted how the mandate and function of the existing mechanisms can be further supported, moving forward, by public international law:

'Developing common standards based on transparent and objective criteria rooted in Public International Law would help observer groups maintain high professional

[352] United Nations Declaration of Principles for International Election Observation and Code of Conduct for Election Observers (2005).
[353] Avery Davis-Roberts, David Carroll, 'Using International Law to Assess Elections', (Democracy Program, The Carter Center, USA, 2010) p.3 Available at: https://www.cartercenter.org/resources/pdfs/peace/democracy/des/internationallaw-assesselections-prepub.pdf Last accessed July 2017.

standards of impartiality, integrity and transparency, and should strengthen their ability to play key roles in supporting genuine democratization.'[354]

Through drawing up standards based on the existing commitments already made by states in their treaty-obligations, we could be capable of tailoring international standards on elections and building democratic institutions, which are cemented in international legal obligations. Grounded in Article 25 of the ICCPR,[355] which governs the electoral process, alongside other provisions concerning freedom of expression, assembly and association, could provide the basis for a foundational understanding of democratic elections, and would undoubtedly aid and strengthen the work of our proposed IConC.

[354] *Ibid.* p. 3.
[355] The International Covenant on Civil and Political Rights, Article 25.

Chapter 5: Mapping Convergences in Domestic Crises: Locating the Roots of 'Democratic Decay'

I. 'Authoritarian Reversion' & 'Constitutional Retrogression'[356]

As we have witnessed through our analysis of Levinson and Balkin's category (1) and (3) crises, many of the constitutional crises which we can identify in states after 09/11, are largely a new form of, what Professor Huq and Ginsburg call, 'democratic decay'.[357] Huq and Ginsburg draw upon two competing understandings and models which lead to 'democratic decay': 'authoritarian reversion and constitutional retrogression.'[358] Whilst the former largely conveys a swift and total breakdown in, and of, democratic mechanisms, structures and institutions; the latter, retrogression, conveys:

> *'a more subtle, incremental erosion that happens simultaneously to three institutional predicates of democracy: competitive elections; rights of political speech and association; and the administrative and adjudicative rule of law.'*[359]

[356] Aziz Huq, Tom Ginsburg, 'How to Lose a Constitutional Democracy' *UCLA Law Review* Vol. 65 (2018) Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2901776 Last accessed July 2017.
[357] *Ibid.*
[358] *Ibid.*
[359] *Ibid.*

II. A Descent into 'Democratic Decay'?

Professors Huq and Ginsburg argue in their 2017 article, entitled, 'How to Lose a Constitutional Democracy', that we are witnessing a decline in the former ('authoritarian reversion'), and a surge in the appearance of the latter in states ('constitutional retrogression'). Over the years since 09/11, the United States has over time whittled away at the very backbone of US Constitutional law and key tenets which provide the foundations of the US legal system and rule of law. Though our analysis has shown that the system of checks and balances has largely prevented the descent into an 'authoritarian reversion', it remains far from intact. The reasoning given for why the former has not gripped many states in the midst of a constitutional crisis is because often the constitutional structures have been designed to prevent a fully-fledged collapse of the system in a short time- but it is wholly powerless to the threat of retrogression sporadically and often beyond the reach of detectability. As Huq and Ginsburg assert, 'the constitutional safeguards against retrogression are weak.'[360]

For many commentators, the example of the US 2016 election which resulted in the Presidency of Donald Trump showcased, 'the way that hitherto stable norms of American liberal democracy under the rule of law suddenly seemed fragile and contested', we are witnesses to the 'democratic backsliding' which has gripped our 21st century states, especially our hegemon, the United States.[361]

'Liberal democracy, in short, is subject today to a plural array of corroding crosscurrents arising both from specific partisan formations and actors, and from

[360] *Ibid.*
[361] *Ibid.*

cultural, socioeconomic or geopolitical dynamics of a structural nature. Against these corrosive currents stands the Constitution. It is conventional wisdom that the checks and balances of the federal government, a robust civil society and media, as well as individual rights…will work as effectual bulwarks against democratic backsliding'.[362]

Having said that, these bulwarks are disintegrating before our very eyes. Although we often identify states which fall into category (1) constitutional crises- those related to exceptionalism and 'states of emergency', to come under the label of 'authoritarian reversion', they are in reality more so examples of 'retrogression'. However, 'retrogression' is still an incremental change to be feared and avoided, and will ultimately lead to the same departure from the rule of law and constitutional protections and mechanisms- but it is subtle in its approach and consequently often fails to appear on our radars. Though often political leaders aim to draw up a fearful populace, and thus employ scare-tactics to seemingly be pursuing a road to 'authoritarian reversion', sometimes this is merely media speculation and sensationalism. What we instead see is many states claiming or seemingly pursuing such an authoritarian path, but the mere fact that its materialisation is neither 'quick' nor 'complete' renders such assertions of widespread 'authoritarian reversion' inaccurate.[363]

In a study conducted by Gero Erdmann in 2011, analysing 30 years of experience, he found that 53 states had witnessed 'democratic backsliding', but only 5 had resulted in a fully-fledged shift from democracy to authoritarianism in said state.[364] Notably, 4 of these complete shifts had occurred prior to 1989, and thus it certainly

[362] *Ibid.* p. 5.
[363] *Ibid.* p. 14.
[364] Gero Erdmann, 'Decline of Democracy: Loss of Quality, Hybridisation and Breakdown of Democracy' (GIGA Working Paper No 161, 23 August 2012).

appears as though what we are interpreting as 'authoritarian reversion' is in fact more so 'retrogression'. It is only through acknowledging the differences, and the importance of preventing said 'retrogressions' in states that we are capable of cultivating a solution, which an IConC can spearhead and model itself upon.

III. Bridging Domestic 'Constitutional Retrogression' with Existing International Legal Mechanisms or an International Constitutional Court?

Irrespective of the labels we ascribe to states which have experienced a constitutional crisis to some degree, we must be proactive in our response on the international stage- using any soft law tools available to us, strengthening and/or reforming our existing structures and analysing whether an additional institution is required, alongside equipping ourselves with a better understanding of the inherent nature of states. States may self-identify as semi-democracies, hybrid regimes, electoral authoritarian regimes etc., but regardless, the impact on human rights protections during times of exceptionalism has consistently proven to be detrimental as a common denominator across all states, irrespective of their labels.

Pivotally, if what we are increasingly witnessing is a surge in 'constitutional retrogression' in the domestic sphere, then it seems a logical deduction that the solution to such a retrogression needs to be constitutional in nature. We need to ensure that there is a system in place on the international stage that has a constitutional mandate and can protect against the subtle and incremental erosion of democracy in states. As previously stated, democracy is the prerequisite upon which

human rights protections can be recognised and enforced. If we can establish that the international human rights mechanisms are proving ineffective in successfully fulfilling their promises and preventing 'democratic decay' and the resulting detachment from human rights protections, then perhaps in order to combat the limitations of these existing international mechanisms, we need to creatively consider a constitutional solution.

Levinson and Balkin identify the 'institutional predicates of democracy' as: competitive elections, rights of political speech and association and the adjudicative and administrative rule of law.[365] We have examined in turn the importance of free and fair elections in Chapter 4, both in terms of the power of people and protest (especially concerning freedom of speech and association), with regard to Iceland, The Republic of Korea and The Republic of Tunisia, alongside the negative impacts of illegitimate elections through our analysis of The Russian Federation and Haiti. We can also draw parallels on the predicates of free speech and association, with the examples given in Chapter 3 of our analysis, as often a by-product of combating terrorism and protecting national security has seen the erosion of these freedoms, alongside a gradual overarching departure from the rule of law during periods of exceptionalism. As such, these are the underlying bases which must be strengthened on the international stage in order to ensure future compliance with existing international mechanisms.

We will turn to examining in Chapter 6 if the existing legal mechanisms are proving effective, or whether a void has emerged between the domestic reality and the international standards. Having already analysed the international responses to domestic crises in Chapters 3 and 4, we can already predict that the international

[365] Aziz Huq, Tom Ginsburg, 'How to Lose a Constitutional Democracy' *UCLA Law Review* Vol. 65 (2018) Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2901776 Last accessed July 2017.

mechanisms are struggling to fulfil their mandate. In Chapter 7 we will then strive to theoretically construct an international institution with a constitutional mandate, founded upon the aforementioned 'predicates of democracy' in order to lay the initial foundations for combating domestic 'constitutional retrogression' and 'democratic decay'.

It is only in such a way that we will be capable of stabilising the downward detachment of states from human rights obligations and protections, and empower our existing international legal mechanisms to fulfil their purpose. Ultimately, we cannot merely sit idle and wait for a return to normalcy, which may itself never materialise if the exception has indeed become the rule; we cannot live under Chaplin's illusion that 'the hate of men will pass.'[366] After all, according to Huq and Ginsburg:

'Roughly 1 out of 8 countries will, in its lifespan, experience constitutional retrogression'.[367]

[366] Charlie Chaplin, Final Speech in *'The Great Dictator'* (Charles Chaplin Film Corporation, 1940).

[367] Aziz Huq, Tom Ginsburg, 'How to Lose a Constitutional Democracy' *UCLA Law Review* Vol. 65 (2018) p. 37. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2901776 Last accessed July 2017.

Chapter 6: Exceptionalism in International Law: The International Paradigm

*'For in the end **laws are just words on a page**-*

words that are sometimes malleable, opaque,

*as **dependent on context** and **trust***

as they are in a story or poem or promise to someone,

*words whose meanings are **subject to erosion**,*

*sometimes **collapsing in the blink of an eye**.'*

[Former President of the United States, Barack Obama][368]

I. Regulating Exceptionalism within the Norm: The Monist Model

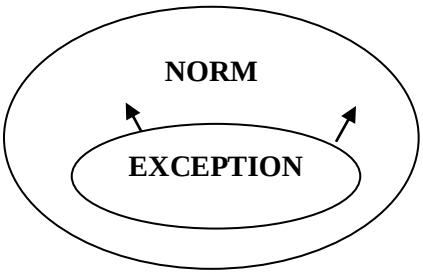
As previously described, when states are confronted with an emergency which 'threatens the life of the nation', they are permitted to sometimes deviate from international human rights treaties, alongside their own domestic constitutions in order to tackle such a threat. In this way, human rights protections are often

[368] Barack Obama, *The Audacity of Hope: Thoughts on Reclaiming the American Dream* (Vintage Books, 2008).

suspended in favour of security concerns; such deviations are largely under-regulated and beyond the protection of adequate checks and balances. In recent years, coupled with the manipulation of such derogation and limitation clauses in international law, the ambiguity of such terms as 'threatens the life of a nation' and 'states of exception', and their infinite nature- human rights protections and constitutional law have fallen by the wayside, perpetually suspended above and beyond the grasp of failing, exceptional states.

In this way, the international human rights legal landscape has been crafted around the central notion of a monist model of law and regulation, with the exception remaining within the mandate of the norm. As the exception becomes increasingly normalised in international law, the result it seems, if the model remains monist, is a complete usurpation of the norm by the exception.

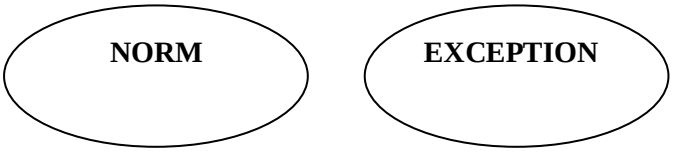
If we are to merely accept and cater to the inputting of 'exceptionalism' within international frameworks which were designed for normalcy, this legitimises exceptionalism as a justification for deviating from human rights and constitutional protections which the international community claim to be universal and interdependent in nature. We must instead stand firm on our commitment to human rights, and ensure that exceptionalism does not dilute normalcy and become the 21st century 'norm'. In sum, there is no space for exceptionalism within the normal terrain of international human rights protections. After all, exceptionalism, by definition, is a suspension of the norm and thus cannot be within it- it is entirely separate. Without a notion of 'normalcy', 'exceptionalism' holds no meaning. We cannot allow the exception to infiltrate and dilute the norm in the international model.



[INTERNATIONAL MONIST MODEL]

In my mind, the confinement of the exception within the norm in international law, the monist model, is not representative of the domestic reality or the conceptual basis upon which exceptionalism is rooted. Put simply, the domestic setting provides for a dualist model, with periods of normalcy maintaining distinct and separate legal spaces from that of exceptional or emergency situations. Thus, the dualist model in the domestic sphere is unable to mould to the international framework of monism in the protection of human rights. Although some commentators may argue that a dualist model in international human rights law could tarnish the claims to universality and interdependence, it is in my view that a more realistic system of protections, one for periods of normalcy and another for exceptionalism could more effectively address the changing legal landscape of states and their commitment to human rights.

Ultimately, the dualist state model requires a corresponding model on the international level. The proposed IConC would provide just this, an avenue through which the domestic exception could be capable of being regulated, without jeopardising the norm.



[DOMESTIC DUALIST MODEL]

Although the initial response to such a quandary might be to suggest merely revoking the power of states to invoke derogation clauses to human rights treaties, as conceding to the 'inevitability of exceptional state measures in times of emergency' undermines the entire premise of international human rights law. [369] Fundamentally, the system of derogation 'creates a space between fundamental rights and the rule of law'-[370] in this way a state can remain within the confines of what is strictly deemed to be legal, whilst contravening human rights norms.

If we revoked the possibility of derogation or limitation clauses, providing no other avenue for confronting exceptional situations, then although this would strengthen the international community's claims that human rights are indeed universal and non-derogable, it would fail to address the inevitability of exceptionalism and would be attacked on grounds of both state sovereignty and the right to self-defence.

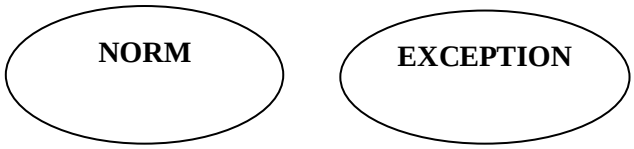
[369] Stephen Humphreys, 'Legalizing Lawlessness: On Giorgio Agamben's State of Exception' *The European Journal of International Law* Vol. 17 (3) (2006) p.678 Available at: http://www.ejil.org/pdfs/17/3/208.pdf Last accessed July 2017.

[370] Tom Hickman, 'Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism' 68 *Modern Law Review* (2005) 655, p. 657. Cited in Stephen Humphreys, 'Legalizing Lawlessness: On Giorgio Agamben's State of Exception' *The European Journal of International Law* Vol. 17 (3) (2006) Available at: http://www.ejil.org/pdfs/17/3/208.pdf Last accessed July 2017.

This would in turn create a legal vacuum for exceptionalism on the international level.

International law has proven most effective when it moulds itself to the malleable terrain of states; we can no longer fool ourselves into believing that state attitudes towards human rights protections are the same as those attitudes held post-WW2. Therefore, the international frameworks and mechanisms which are in place require reform and development to ensure they remain current and well-suited to the nature of states and their behaviour, and capable of combating the issues which confront the international community. On this basis, I propose a dualist international legal system for human rights protections, with the exception regulated and prevented through the work of an IConC.

According to Hickman, what we have at present in terms of the relationship model between states and the international community is 'a double-layered constitutional system':[371] a dualist model whereby international law is capable of dealing with human rights protections during periods of normalcy, but exceptionalism and crises are dealt with in the domestic setting with limited outside-regulation. If we evaluate this dualism we can see the danger of such a situation, with the legal void which is often a by-product of domestic exceptionalism, remaining unchecked and unbalanced.



[DOMESTIC-INTERNATIONAL DUALIST MODEL]

[371] *Ibid.* p.678.

Therefore, not only do we have a dualist model on the domestic level, distinguishing between times of normalcy and exceptionalism, but we also can decipher dualism within the international-domestic relationship, wherein the former presides during times of normalcy, and the latter, periods of exceptionalism. How can we consequently expect the monist frameworks of international human rights law to conform to the domestic reality?

In my mind, the mistake made by the crafters of international law lay in attempting to build international human rights law on a monist model, attempting to place the exception within the norm. If we return to the very root of exceptionalism and authoritarianism- the model of Roman dictatorships, we can identify that exceptionalism under such dictatorships was always based on a dualist understanding of the norm being distinct from the exception. This does not imply that either are beyond regulation or oversight, quite the contrary. Roman dictatorships were balanced by a regulator who had the power to identify the exception and pivotally this regulatory body was distinct from the dictator itself ('hetero-investiture'). It is this void which an IConC is capable of bridging, mirroring a regulated dualist model which provides safeguards at all levels to prevent a legal vacuum, within which the 'homo sacer' may fall.

A. Proposing a Dualist Model: Learning Lessons from Roman Exceptionalism

'International terrorism represents a form of emergency so unlike any Roman circumstance that it is necessary to re-examine the Roman model to see if it retains lessons for how a democratic political system should be organised.'[372]

Professors John Ferejohn and Pasquale Pasquino have analysed this interplay between monism and dualism in the context of the law on exceptionalism, drawing predominantly on the example of Roman law on exceptionalism and dictatorships.[373] Their work is invaluable in establishing not only the inevitability of a failing monist structure in international human rights law, but also setting the foundations upon which we are capable of constructing a dualist model, utilising the example of Roman law.

At the crux of the understanding of exceptionalism within the Roman context, was the aim of emergency derogation being an eventual return to the norm and previous state of being, emergency powers were far from permanent, nor were they unlimited. Perhaps the most prominent of advocates for the Roman dictatorships came from Machiavelli in stating:

'As is seen ensued in Rome where in so much passage of time no dictator did anything that was not good for the Republic…a dictator was made for a (limited)

[372] John Ferejohn & Pasquale Pasquino, 'The Law of the Exception: A Typology of Emergency Powers' (Oxford University Press & New York University School of Law, I.CON, Vol 2(2), 2004) p. 228.
[373] John Ferejohn & Pasquale Pasquino, 'The Law of the Exception: A Typology of Emergency Powers' (Oxford University Press & New York University School of Law, I.CON, Vol 2(2), 2004) pp. 210-239.

time and not in perpetuity, and only to remove the cause for which he was created; and his authority extended only in being able to decide by himself the ways of meeting that urgent peril…but he could do nothing to diminish (the power) of the state…so that taking together the short time of the dictatorship and the limited authority that he had, and the roman people uncorrupted, it was impossible that he should exceed his limits and harm the city: but from experience it is seen that it (the City) always benefited by him. [374]

However, our present-day domestic exceptionalism largely fails to conform to Machiavelli's understanding and depiction of the Roman example, with the two central tenets to his notion of exceptionalism which ensured that a dictatorship was limited, largely absent from our 21st century examples, namely the need for a short duration and a limited authority. Our current interpretation of exceptionalism is perpetual in nature and arguably limitless, in comparison to the Roman counterparts. Whereas our current constitutional systems grant special emergency powers to an elected President or leader from within inside the government, the distinct feature of the Roman model was that this 'dictator' figure was chosen from outside of the government- an inherently dualist system, wherein the exception was held in a separate legal and political space from the norm, including the figure who presided over said exceptional period.

According to the Roman model, during periods of emergency, the Senate body suspended its own operations and permitted a dictator figure to assume the constitutional duties on their behalf for a 6-month term, who was elected by the Consul body. In this way, a 'hetero-investiture' structure can be identified with a clear separation between the body declaring an emergency (Senate) and the

[374] Niccolo Machiavelli, *Discourses on Livy* ch.34 (John Roland ed. Henry Neville Trans. 1675) (1517) (In English), cited in *Ibid.* p. 211.

individual who exercised the authority to confront it.[375] It is precisely in this way that many contemporary states are failing to safeguard against perpetual exceptionalism- for the most part, states have no clear distinction between the body who declare an emergency, and the body or individual who is granted the authority to deal with it. It is fundamentally this Roman dualist, 'hetero-investiture' model which is required on the international level. This would ensure that even if the domestic setting uses one body to not only declare an emergency but also grants the authority to confront it, we are able to add an extra check to this system and mould a 'hetero-investiture' model on the international level. With an IConC, this regulatory system would provide this check on a centralised concentration of power on the domestic level.

Therefore, the Roman example teaches us an important lesson on the importance of having a strong separation between power structures during times of exceptionalism. If states are to deviate from the norm, then certain balances and checks should be in place, without a 'hetero-investiture' model it is unsurprising that our contemporary exceptional states are largely perpetual and limitless in their power. Through adding a regulator to the sphere of exceptionalism on the international level, an IConC, we would be better-equipped to confront exceptionalism, and ensure a return to normalcy.

As Professors Ferejohn and Pasquino assert, there is a fine line between state 'derogation' from the norm and an 'abrogation' of the norm.[376] I assert that increasingly we are seeing not merely derogations from the norms of international human rights law, but actually their gradual abrogation. We increasingly see that

[375] John Ferejohn & Pasquale Pasquino, 'The Law of the Exception: A Typology of Emergency Powers' (Oxford University Press & New York University School of Law, I.CON, Vol 2(2), 2004) pp. 217-218.
[376] *Ibid.* p. 223.

exceptionalism is not being used to ensure a return, and ultimately protection of, human rights- but instead to justify a gradual decline and weakening of their mandate and power. According to the aforementioned academics, and I myself concur:

'it may be necessary to create legal boundaries around emergencies to substitute for the geographic and temporal ones that no longer exist.'[377]

II. Limitations of Existing International Legal Mechanisms to Adequately Address Exceptionalism & Emancipate the Homo Sacer

'[There is] strong global consensus on the need to ensure the continued relevance and vitality of the treaty bodies.'[378]

During periods of exceptionalism and neglect of human rights and the rule of law, often the only avenue left for redress are those available through international channels, as the domestic domain becomes increasingly incapacitated by varying degrees of authoritarianism. Thus, we must analyse the pitfalls of the international architecture which have allowed for the proliferation of

[377] *Ibid.* p. 228.

[378] Ban Ki Moon, Former United Nations Secretary-General, 'Foreword by the Secretary General' (June 2012), cited in: Navanethem Pillay, 'Strengthening the United Nations Human Rights Treaty Body System: A Report by the United Nations High Commissioner for Human Rights' (United Nations Office of the High Commissioner, June 2012) p.7. Available at: http://www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBStrengthening.pdf Last accessed July 2017.

authoritarianism or constitutional crises and thus the neglect of human rights protections. What are their powers, mechanisms and most importantly, how effective have they proven to be?

One way in which the international community has attempted to entrench human rights in the domestic setting is through the use of treaties and their subsidiary bodies. When a state ratifies a human rights treaty, they commit themselves to guaranteeing the rights therein within their jurisdiction. The foundational precepts upon which many human rights treaties were based can be identified in the initial text of the Universal Declaration of Human Rights (1948),[379] which stipulated a commitment to:

'a common standard of achievement for all peoples and nations.'[380]

Laying down basic notions of civil, political, economic, social and cultural rights which should be enjoyed by all, the UDHR (1948) is widely deemed to be the foundation upon which human rights treaties have been crafted. In this way, the UDHR (1948), alongside the International Covenant on Civil and Political Rights (ICCPR) (1966) and its 2 Optional Protocols,[381] and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966),[382] are often collectively coined the 'International Bill of Human Rights'.[383] The codification of these foundational human rights norms have taken a variety of forms and thus hold

[379] The Universal Declaration of Human Rights (1948) (General Assembly Resolution 217A).
[380] *Ibid.*
[381] The International Covenant on Civil and Political Rights (1966) S. Treaty Doc No. 95-20, 999 U.N.T.S. 171; Optional Protocol to the International Covenant on Civil and Political Rights (1966); Second Optional Protocol to the International Covenant on Civil and Political Rights (1989).
[382] International Covenant on Economic, Social and Cultural Rights (1966).
[383] United Nations Office of the High Commissioner, 'International Human Rights Law'. Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx Last accessed July 2017.

differing levels of recognition and enforceability. Strengthened further by regional mechanisms of human rights protection, human rights norms have thus been expanded across many areas, which has in turn reinforced their recognition and strengthened their mandate. Undoubtedly, international human rights instruments, declarations, guidelines and principles form the backbone of this intricate carefully-crafted system of protections.

We must remind ourselves after all that the central purpose of the United Nations, as per the United Nations Charter (1945) is:

*'To **reaffirm faith in fundamental human rights**, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and **to establish conditions** under which justice and **respect for the obligations arising from treaties and other sources** of international law can be maintained.'*[384]

It is upon this basis, with the need to 'establish conditions' in order to ensure that states respect and remain committed to their obligations under international human rights law, that we critique whether these conditions are already in place, and the extent to which they are proving effective when confronted with state claims to exceptionalism.

Although the body of international human rights mechanisms and treaties have proliferated in recent years, broadening their scope and carefully-crafting specialised treaties, we will focus herein on the foundational treaties upon which others have built: namely the ICCPR, ICESCR, The UN Charter and the UDHR, alongside the overarching UN mechanisms. The proposed IConC would draw upon these foundational instruments as the source of its mandate, establishing itself as a

[384] United Nations Charter (24 October 1945), Preamble.

new 'condition' through which 'faith in fundamental human rights' can be once again, 'reaffirmed'.

A. Navigating Difficult Terrain: Universalism and Exceptionalism

'By universalism, we refer to the view that the rules of international law apply to all states.'[385]

International law historically consisted of contracts between states, alongside general customs and norms, with additional multilateral treaties between states on particularities of military conflict etc. But with the 20th century came the creation of the United Nations, which crafted treaties on 'issues of global concern, including the laws of war, human rights, protection of the environment' etc., with 'the expectation…that the treaty obligations would be the same for all states.'[386] Thus, a foundational recognition that the laws surrounding international human rights protections were inherently universal, was established.

'Once a global problem is identified, it is understood that an international solution binding all states should be sought…states may continue to negotiate bilateral and regional agreements to address narrow cross-border and regional problems, but these agreements…must be consistent with states' obligations under multilateral treaties.'[387]

[385] Anu Bradford & Eric A. Posner, 'Universal Exceptionalism in International Law' *Harvard International Law Journal* Vol. 52(3) (2011) p.7.
[386] *Ibid.* p. 7.
[387] *Ibid.* p.7.

Consequently, the notion of universalism in international law was cemented. But somewhere along the way these obligations became diluted by reservations, derogations and limitations- resultantly, the existing international legal mechanisms began to wane and tire under new pressures.

The issue becomes to what extent the international community can continue to enforce and argue for the universality of human rights, if states are largely granted the power to derogate at will, often without justification or a time limit. If we are to claim that all human rights are interconnected and interdependent, how can we reconcile this with state derogations and reservations from key human rights treaties? It is this interplay between the pursuit of the universal application of the norm in international human rights law, coupled with the increasingly exceptional claims of states, that has brought about the 21st century plight of international human rights law, hindered further by under-reporting, unenforceability and overworked and under-funded international institutions.

In the analysis which ensues, we will draw upon the differing ways in which during periods of domestic exceptionalism, states derogate, limit or make reservations to their binding international legal obligations to limit their human rights obligations in the name of security or the safety of their nation or peoples. Furthermore, we will identify the pitfalls of the International Court of Justice and other international legal mechanisms in terms of reporting, accountability and enforceability.

Ultimately, we will return to our starting position post-WW2, with the enactment of the UDHR (1948) and the UN Charter (1945), to refocus our attention on the void which has emerged between these two foundational instruments and the struggling mechanisms we see before us today. This void, in my mind, and the current limitations of international law, could be bridged and reinforced through the 'Constitutionalisation' of the former 2 instruments as the back-bone of all the

treaties which succeeded to them. Thus, the proposal for an International Constitutional Court takes centre stage of our analysis.

III. Key International Human Rights Treaties and Bodies

A. The International Covenant on Civil and Political Rights (ICCPR) (1966) & The Human Rights Committee

Generally-speaking, treaty bodies largely perform the function of reviewing the implementation of 'states of emergency' where said states have ratified the relevant treaties in question. In providing this watchdog function, if the international bodies become concerned with a state's practice, they can apply international pressure and discredit the regime through international publicity in order to push for greater compliance with human rights protections. Many treaties provide for safeguards to ensure derogation and limitation clauses are not abused by states, and exceptionalism normalised; the extent to which these bodies have proven effective in confronting such situations is debatable.

Let us begin with a discussion of the stance and methods of the International Covenant on Civil and Political Rights (ICCPR) (1966), in confronting exceptionalism in international law. Article 4(1) of the ICCPR stipulates:

'In times of public emergency which ***threatens the life of the nation*** *and the existence of which is* ***officially proclaimed****, the State parties to the present Covenant* ***may take measures*** *derogating from their obligations under the present Covenant*

to the extent strictly required by the exigencies of the situation*, provided that* ***such measures are not inconsistent with their obligations under international law*** *and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.'*[388]

This provision was added to the draft of the ICCPR in 1947, resulting from a suggestion made to the Drafting Committee by the United Kingdom who advocated for possible derogation from all obligations therein, 'to the extent strictly limited by the exigencies of the situation'.[389] The Netherlands, foreseeing that broad derogations could hinder the success of the (then) Commission, instead asserted the need for a clearly-defined derogation clause, whilst the USA and USSR argued against any form of derogatory provision.[390] Interestingly, during the drafting phase of the ICCPR France argued that:

'derogation from the Covenant must be subject to a ***specified procedure*** *and that such derogation, undertaken under exceptional circumstances, must accordingly be given exceptional publicity.'*[391]

It is just such a mandate and function that I assert that an International Constitutional Court is capable of filling in our subsequent analysis- a regulatory as well as a judicial role. Ultimately, during the drafting period, the ground-breaking nature of promulgating an international human rights treaty which obliged states to protect human rights within its jurisdiction was sufficient enough to warrant a largely broad scope for derogation, albeit with certain safeguards: 'exceptional

[388] International Covenant on Civil and Political Rights (1966), Article 4(1).
[389] United Nations Office of the High Commissioner for Human Rights, International Bar Association, 'The Administration of Justice During States of Emergency' in *Human Rights in The Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers'* (United Nations Publications, 2003) p. 816; Article 4(1) ICCPR (1966).
[390] *Ibid.* p. 817.
[391] UN Doc. E/ CN.4/ SR. 126. p.8 Cited in *Ibid.* p. 817.

threat, official proclamation, non-derogability of certain rights, strict necessity, compatibility with other international legal obligations, non-discrimination and international notification'[392]

Although formal legal safeguards were thus codified, the substantive protection against the abuse of derogation has proven difficult to enforce. The requirement for states to report to the UN Human Rights Committee on the bases upon which they are derogating from ICCPR rights, and to what extent, has proven insufficient for example. The explanations by states are often vague and/or delayed:

> *'Uruguay, for example, provided a notification to the Covenant's depositary effectively 3 years after it was obligated to do so, and when questioned by the Committee concerning the lack of information provided (such as from which articles the state sought to derogate), the government stated that the emergency was "a matter of universal knowledge" and any substantive justification would be "superfluous".'*[393]

As a result of such ambiguity, it renders the Committee largely incapable of monitoring ongoing state practice during periods of exceptionalism. We could likewise witness a failure to inform or justify derogation in the case of the United States:

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[392] United Nations Office of the High Commissioner for Human Rights, International Bar Association, 'The Administration of Justice During States of Emergency' in *Human Rights in The Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers'* (United Nations Publications, 2003) p. 819.

[393] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N. P. Engel, 2005) p. 103. Cited in: Scott Sheeran, 'Reconceptualising States of Emergency under International Human Rights Law: Theory, Legal Doctrine and Politics' *Michigan Journal of International Law* Vol. 34(3) (2013) p. 521. Available at: http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1000&context=mjil Last accessed July 2017.

'*[they] did not submit a notification of derogation from the Covenant after 09/11 "despite the official national proclamation of an emergency and the imposition of a wide range of legislative and executive policies derogating in practice from the rights protected under the Covenant".* '[394]

The inclusion of provisions permitting derogation from the ICCPR (1966) were included by the treaty drafters after a great deal of debate, and with the caveat of the formal safeguards provided for in Article 4(1). Following suit, derogation clauses were likewise inserted into The American Convention on Human Rights (Article 27),[395] and The European Convention on Human Rights (Article 15).[396]

The International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) provides for a general limitation, closely mirroring Article 29 of the UDHR (1948) which stipulates:

'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are ***determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others*** *and of* ***meeting the just requirements of morality, public order and the general welfare in a democratic society****.* '[397]

Similarly, Article 4 of the ICESCR (1966) states:

'The State may subject such rights only to such limitations as are ***determined by law*** *only in so far as this may be* ***compatible with the nature of these rights*** *and*

[394] Joan Fitzpatrick (1994) p.263. Cited in Scott Sheeran, 'Reconceptualising States of Emergency under International Human Rights Law: Theory, Legal Doctrine and Politics' *Michigan Journal of International Law* Vol. 34(3) (2013) p. 525. Available at: http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1000&context=mjil Last accessed July 2017.
[395] The American Convention on Human Rights (1969), Article 27.
[396] The European Convention on Human Rights (1950), Article 15.
[397] The Universal Declaration of Human Rights (1948), Article 29.

solely for the purpose of promoting the general welfare in a democratic society.'[398]

The ICESCR (1966) is further hindered in the face of state exceptionalism by the stipulation made in Article 2(1) regarding the 'progressive realisation' of the rights therein.[399] Underlying all limitation and derogation clauses, however, is a common reference to a continual 'respect of the legally protected substance of a right,'[400] which in theory should protect the provisions from severe deviation.

In light of increasing derogation from the ICCPR, and non-compliance with Article 4(1), in 2001 the Human Rights Committee granted itself the mandate to monitor practices, irrespective of whether the state in question has notified the Committee of its intention to derogate or not, under General Comment 29.[401] The Committee reiterated two conditions to be met by states wishing to derogate from the ICCPR, namely: (1) must amount to a 'public emergency which threatens the life of the nation', and (2) the State must have officially declared an emergency.[402] The Committee further reiterated that:

'Emergency legislation cannot therefore remain in force for so long that it ***becomes institutionalised*** *so that it is* ***the rule rather than the exception***.'[403]

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[398] International Covenant on Economic, Social and Cultural Rights (1966), Article 4.
[399] *Ibid*, Article 2(1).
[400] United Nations Office of the High Commissioner for Human Rights, International Bar Association, 'The Administration of Justice During States of Emergency' in *Human Rights in The Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers'* (United Nations Publications, 2003) p. 814.
[401] Human Rights Committee, General Comment 29: States of Emergency (CCPR/C/21/Rev.1/Add.11(2001)) Cited in: *Ibid.* p. 521.
[402] *Ibid.*
[403] United Nations Office of the High Commissioner for Human Rights, International Bar Association, 'The Administration of Justice During States of Emergency' in *Human Rights in The Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers'* (United Nations Publications, 2003) p. 824.

Another issue which the Human Rights Committee is forced to grapple with is the continued violation of non-derogable rights, for example the right to life (Article 6, ICCPR), freedom from torture or degrading treatment (Article 7, ICCPR), and freedom from slavery (Article 8, ICCPR). The non-derogable rights are stipulated in Article 4(2) of the ICCPR.[404]

> *'In spite of their non-derogable nature, these rights tend in many cases to be the most frequently violated in emergency situations, thereby rendering a return to normalcy more difficult. In such situations, the role of judges, prosecutors and lawyers in contributing to the effective protection of the individual becomes more crucial than ever, and their respective responsibilities must be exercised with full independence and impartiality lest the individual be left without legal protection.'*[405]

Arguably the most prominent non-derogable right which is commonly violated by states during exceptionalism, which has proven especially poignant in light of the 'War on Terror', is Article 7 of the ICCPR, concerning freedom from torture and other forms of ill-treatment. [406] From our prior analysis, we have witnessed how torture, inhuman and degrading treatment have been commonly used post-09/11 as a method of countering terrorism.

Although the Committee has entrusted itself with the mandate of assessing the strict necessity of derogatory action by states, it is largely limited in doing so. When it does provide recommendations to states, it does so through the periodic reporting mechanism, but this is also wholly reliant on state engagement with that platform of

[404] International Covenant on Civil and Political Rights (1966), Article 4(2).
[405] United Nations Office of the High Commissioner for Human Rights, International Bar Association, 'The Administration of Justice During States of Emergency' in *Human Rights in The Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers'* (United Nations Publications, 2003) p. 833.
[406] International Covenant on Civil and Political Rights (1966), Article 7.

accountability. The Committee has done so with regard to the perpetual status of emergencies in Israel, Spain and the United Kingdom. [407] Although 'the Committee is clearly concerned about the territorial, temporal and material extent of any emergency measures taken by state parties', it is largely ill-equipped to counter or challenge the will of the states concerned.[408]

In line with Article 40 of the ICCPR,[409] states must submit periodic reports to the UN Human Rights Committee for review of their human rights obligations. [410] However, such reporting is done in excess of every 5 years, and within this time a serious decline in a state's human rights situation is capable of materialising. The infrequency of the reporting process is thus a limitation of many treaty bodies, with the ICCPR being no exception to this. However, Article 40 of the ICCPR does allow for the option of requesting further reports from states, at the discretion of the Human Rights Committee, although this has not been invoked in cases of 'state of emergency' reporting to date.

Individual complaints mechanisms for numerous treaty bodies have proved to be vital in monitoring the human rights situation of states during periods of exceptionalism, for example, the First Optional Protocol to the ICCPR provides for

[407] United Nations Office of the High Commissioner for Human Rights, International Bar Association, 'The Administration of Justice During States of Emergency' in *Human Rights in The Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers'* (United Nations Publications, 2003) p. 853.
[408] *Ibid.* p. 854.
[409] The International Covenant on Civil and Political Rights (1966), Article 40.
[410] Scott Sheeran, 'Reconceptualising States of Emergency under International Human Rights Law: Theory, Legal Doctrine and Politics' *Michigan Journal of International Law* Vol. 34(3) (2013) p. 519. Available at: http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1000&context=mjil Last accessed July 2017.

such a mechanism.[411] Upon this basis, numerous individual complaints have been brought to the attention of the UN Human Rights Committee, with regard to 'states of emergency'. Although this is an important mechanism, the difficulty in enforcing its decisions renders the process largely futile, unless soft powers can be invoked to sway state compliance.

'Furthermore, even if there is access to an individual complaints mechanism, the consideration by the treaty body relies on a case being brought, rather than on an automatic review of the derogation and state of emergency and its compliance with the treaty law.'[412]

Although formally, inter-state complaints are capable of being invoked by states, in accordance with the ICCPR they have rarely been invoked. The rare examples of inter-state complaints have arisen in the regional context, using the European system of human rights protection, but are largely too controversial, I believe, to be used on the international level: 'the diplomatic ramifications of one state putting another one "in the dock" for human rights issues' renders this mechanism largely ineffective.[413] The International Court of Justice (ICJ) has the competence to adjudicate on inter-state cases, but importantly, states must consent to the jurisdiction of the court, and therefore, also its decisions. Pivotally, there is no mechanism in place which can ensure this consent is given, nor are there any measures to ensure compliance with a decision, even if the consent hurdle has been

[411] Optional Protocol to the International Covenant on Civil and Political Rights (1966) Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx Last accessed July 2017.
[412] Scott Sheeran, 'Reconceptualising States of Emergency under International Human Rights Law: Theory, Legal Doctrine and Politics' *Michigan Journal of International Law* Vol. 34(3) (2013) p. 522. Available at: http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1000&context=mjil Last accessed July 2017.
[413] *Ibid.* p. 522.

satisfied.[414] Therefore, the extent to which the ICCPR and its accompanying Human Rights Committee remain limited in their capacity to confront exceptionalism by states, hindered by limitations, derogations and the unenforceability of reporting procedures and recommendations. These models provide a perfect example of the limitations we face in the international community when we attempt to construct models of international law wherein the exception is placed within the norm.

'It is a good lesson to keep in mind that at no time in history has too much justice and respect for individual rights and freedoms been harmful to national and international peace, security and prosperity.'[415]

B. The UN Human Rights Council & Special Procedures

Special Procedures, which come under the ambit of the UN Human Rights Council, have often been used to both investigate and better understand exceptionalism and the proliferation of 'states of emergency', in order for the international community to better gauge how best to plot a progressive strategy forward. In this way, special rapporteurs have been mandated with investigating abuse under authoritarian regimes, and working groups established to analyse findings etc.

[414] Monique Chemillier-Gendreau, 'How to Enforce Guarantees of Freedom: The Court of Democracy' (September 2013, Le Monde Diplomatique). Available at: http://mondediplo.com/2013/09/02democracy Last accessed July 2017.

[415] United Nations Office of the High Commissioner for Human Rights, International Bar Association, 'The Administration of Justice During States of Emergency' in *Human Rights in The Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers'* (United Nations Publications, 2003) p. 885.

From 1985-1997, a Special Rapporteur for States of Emergency was created by the UN Human Rights Commission. A list was consequently drawn up every year of states under a 'state of emergency', their state reports analysed to determine their level of compliance with human rights obligations and recommendations made as to potential legislation and measures which should be taken by said state to better-ensure compliance during their period of exceptionalism. Following this, the Special Rapporteur began to annually denounce countries alleging to be under 'states of emergency', by drawing up a list of all those guilty of such, even those who were not party to treaties.

'The publication of an annual list was a very important tool for transparency under the auspices of the United Nations.'[416]

In much the same way, I have likewise attempted to draw attention to the need for transparency and the soft law tools of legitimacy in the field of international human rights law, in order to open up the floor to criticism from other states, and thus progress towards greater compliance and accountability. As ever, the aforementioned Special Rapporteur was limited in his capacity on account of the lack of financial resources available to such UN mechanisms- but I think it is worthy of note that such fact-finding missions are vital in preventing a fully-fledged world in a constitutional crisis, a role which could be transposed to an IConC in the future.

Generally-speaking, the UN Human Rights Council, an inter-governmental body which is comprised of 47 states, elected by the UN General Assembly, is entrusted

[416] Scott Sheeran, 'Reconceptualising States of Emergency under International Human Rights Law: Theory, Legal Doctrine and Politics' *Michigan Journal of International Law* Vol. 34(3) (2013) p. 523. Available at: http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1000&context=mjil Last accessed July 2017.

with the mandate of protecting human rights globally. Often thematically divided, the UNHRC oversees the implementation of human rights by states, making recommendations if violations can be deciphered. Common criticisms of the body include its unenforceability and its alleged increasing politicisation and regional bias. The UNHRC's powers include the assessment of UN member states' human rights records through Universal Periodic Review (UPR), an Advisory Committee which serves as the 'think-tank' for thematic issues,[417] a Complaints Procedure which allows for individual and organisation-brought complaints on alleged human rights violation before the Council, alongside the aforementioned Special Procedures.

The Office of the High Commissioner for Human Rights (OHCHR), reporting to the UNHRC, is a member of the UN Counter-Terrorism Implementation Task Force, which oversees the interplay between human rights and terrorism. The Counter-Terrorism Committee, an arm of the aforementioned, reported to the UN Security Council 4 ((a)-(d)) areas which required more attention, largely mirroring our previous analysis, namely:

'(a) The question of legality, including vague definitions of acts of terrorism that have led to the prosecution of individuals for the legitimate, non-violent exercise of the rights to freedom of expression, association etc.'

'(b) The need to respect and protect non-derogable rights…national, ethnic, racial or religious profiling raises concerns with regard to the non-derogable principles of equality and non-discrimination…also, the question of torture and ill-treatment. These discriminatory and stigmatizing measures affect the rights of communities

[417] United Nations Office of the High Commissioner for Human Rights, 'United Nations Human Rights Council'. Available at: http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx Last accessed July 2017.

and may lead to further marginalization and possibly radicalization within those communities.'

'(c) The expansion of surveillance powers and capacities of law enforcement agencies and the need to adequately protect the right to privacy.'

'(d) Accountability for human rights violations, which is especially crucial to effective counter-terrorism strategies.'[418]

The most prominent concerns of this Committee were surrounding accountability and reparations, in light of widespread state use of torture, arbitrary detention, disappearances and summary executions to combat terrorism.[419] Such violations have often failed to be investigated, perpetrators left unpunished and victims offered little or no reparation, contrary to Article 2 of the ICCPR (1966). Alongside this, accountability has proven problematic in the context of counter-terrorist strategies taken by intelligence and military services, as we will examine later in the context of state secret privileges:

'Covert actions raise particular challenges for accountability. Since they are secretive types of action, where information is classified, it is difficult for the legislator and the judiciary to be aware of them. It should be recalled that all measures taken by law enforcement agencies must be lawful under national and international law, and compatible with state's human rights obligations. This means that all activities undertaken by intelligence agencies, including intelligence-gathering, covert surveillance activities, searches and data collection must be

[418] United Nations General Assembly, Human Rights Council, 'Report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' (13th Session, 22 January 2010) A/ HRC/ 13/ 36 p.6.
[419] *Ibid.* p.8.

regulated by law, monitored by independent agencies and subject to judicial review.'[420]

The international legal community has proven proactive in confronting the inevitable impact of terrorism on human rights, and in preventing the exceptionalism which terrorism has roused from jeopardising the respect, recognition and protection of human rights by states. A vast and intricate body of mechanisms have tailored guidelines, treaty interpretations, Special Rapporteurs for fact-finding missions and Independent Experts and Taskforces to better understand the interplay between security, terrorism and human rights protection. The overarching concerns which have been identified are the consistent derogation by states from non-derogable human rights, the widespread impunity and lack of accountability for human rights violations relating to counter-terrorism measures, and limited reparations for victims of counter-terrorism measures. At the crux, we can identify a gradual departure from using accountability mechanisms during periods of exceptionalism, an issue which the international community is struggling to grapple with in any substantial way.

The ultimate price, if this predicament is ignored by the international community, might prove to be irreparable. We increasingly are witnessing the central back-bone of the UN system being compromised and weakened, this in turn will compromise the fundamental values which run to the heart of international law- the pursuit of justice, international peace and security, the rule of law and the universal protection of human rights.

[420] *Ibid.* pp. 11-12.

IV. Struggles of the International Court of Justice (ICJ) in Protecting Human Rights Against Domestic Exceptionalism

A. An Outline of the ICJ: Mandate and Jurisdiction

The International Court of Justice (ICJ), serves as the primary judicial organ of the United Nations and was created in 1945 through the ICJ Statute, which forms part of the UN Charter (1945). Its mandate is to:

'Settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies.'[421]

During the initial post-WW2 drafting of the ICJ's role and function with regard to the implementation and oversight of international law, it was recognised from the outset that the court had 'advisory jurisdiction' and states would not be forced into accepting said jurisdiction, nor would the ICJ become involved in purely political matters.[422] In this way, the ICJ has a 'dual jurisdiction'- deciding legal disputes which have been submitted by states ('contentious jurisdiction'), and offering non-binding advisory opinions on controversial legal questions, which have been requested by UN Organs or agencies ('advisory jurisdiction'). With regard to 'Contentious Jurisdiction', 'the Court can only deal with a dispute when the states

[421] International Court of Justice, 'The Court' Available at: http://www.icj-cij.org/en/court Last accessed July 2017.
[422] *Ibid.*

concerned have recognised its jurisdiction'.[423] This consent doctrine goes to the very heart of international law; states can only be bound by obligations they have freely consented to being held accountable for.

Although the ICJ had a busy workload from its establishment to the late 1960's, states became increasingly disengaged from it from the 1970's. However, in recent years, a judicially-active ICJ has once again come to the fore of the international community.

'Countries have now found greater use of it; ironically about a third of recent cases have been disputes between African countries.'[424]

B. Common Criticisms of the ICJ: The Theoretical Paradigm

Dr Keith Suter, in his analysis of the ICJ has located 6 possible limitations, 4 of which we will draw upon in turn. Firstly, he identifies that 'there is a lack of a common global philosophy underpinning respect for one system of international law,'[425] he argues that more often than not, governments will act on the basis of their own self-interest and not the global common good, and thus a general court for the international community remains a largely optimistic vision rather than a reality.

[423] International Court of Justice, 'How the Court Works' Available at: http://www.icj-cij.org/en/how-the-court-works Last accessed July 2017.
[424] Dr Keith Suter, 'The International Court of Justice' (Global Directions) Available at: http://www.global-directions.com/Articles/Global%20Politics/InternationalCourtofJustice.pdf Last accessed July 2017.
[425] *Ibid.*

Although generally speaking, we may struggle to locate convergence in international opinion on all matters of international law, if we narrow this down to the common characteristics and foundations found in the UN Charter (1945) and the UDHR (1948), then arguably consensus might not be so difficult to find between states with regard to our proposed IConC and a foundational international constitutional law.

Secondly, is the issue of state sovereignty with regard to the granting of jurisdiction to the ICJ- although 191 countries are indeed ICJ members, this does not necessarily imply that they have consented to their jurisdiction. Only around 65 members of the UN community have in fact accepted ICJ jurisdiction. [426]

'Only about a third of UN members accept compulsory jurisdiction based on Article 36(2) of the Statute. Many of these have significantly conditioned their acceptances.'[427]

However, in contentious inter-state claims, both state parties must have consented to ICJ jurisdiction- one of the most controversial refusals to grant this consent has been found in the stance of the United States, which we will later examine. In my mind, the reason why state consent to ICJ jurisdiction is relatively low is on account of the broad and sweeping mandate which it holds, and therefore the vast powers it is capable of exercising if jurisdiction is granted. If we are able to limit the scope of judicial institutions into specialised areas of law, they prove more effective and states tend to feel that their sovereignty has not been compromised to such a great extent. For example, if we draw upon the International Tribunal for the Law of the Sea (ITLOS) or the ICC, we can see that specialised judiciaries are arguably more

[426] *Ibid.*
[427] John Crook, 'The International Court of Justice and Human Rights, *Northwestern Journal of International Human Rights* (Vol. 1(1) (Fall 2004)) p. 6.

effective than a broad all-encompassing institution- far from fragmenting the sphere of international law, they strengthen the body as a whole.

Thirdly, only states are capable of holding international legal personality, and thus only inter-state complaints can be brought before the ICJ, indigenous or ethnic groups do not hold sufficient legal standing.

'This limitation reflects the State-centred view of international law prevailing when the statute of the ICJ's predecessor was drawn up after World War I.'[428]

The ICC attempted to bridge this legal standing void, by allowing for the investigation and prosecution of individuals who are allegedly guilty of international crimes, but otherwise, the focus of the international community remains largely centred upon inter-state relationships. The proposed IConC would refrain from concentrating merely on inter-state claims, but instead empower civil society into initiating an investigation or claim, and thus legal standing would be granted in a broad sense so as to bolster oversight capabilities.

A common criticism of the ICJ, fourthly, is that of a lack of enforceability of decisions made. Due to the absence of an international policing structure, there is no system for the enforcement of ICJ judgements. If a decision is ignored by a state then the matter is capable of being sent to the UN Security Council for further review, however this is in itself hindered by the veto powers of the 5 permanent Security Council members who can ultimately stall any such attempt to enforce a judgement.

'For example, in the 1980's Nicaragua took the United States to the ICJ over the mining of its harbours. When the US realised that the case was going badly, it

[428] *Ibid.* p. 2.

walked out of the ICJ and then vetoed attempts by the UN Security Council to enforce the ICJ decision.'[429]

Dr Suter ultimately advocates for a strengthening of international law and the ICJ: 'International law in general and the ICJ in particular need to be brought in from the cold.'[430] It seems to me that through utilising specialised judicial institutions we are better able to confront the vast array of international legal issues which face a globalised world- this compartmentalising of international law is far from counterproductive, it has in fact allowed for great progress with regard to ITLOS and the ICC. It is with this in mind, that I assert that the granting of jurisdiction to an IConC on matters of international constitutional law, framed around the foundational ideas in the UN Charter (1945) and UDHR (1948), could prove more effective than a sweeping all-encompassing ICJ.

C. The ICJ in Practice: Grappling with Domestic Exceptionalism?

'The Court has…served as a sort of Constitutional court for the United Nations. Several Advisory Opinions have established key principles regarding powers and functions within the UN.'[431]

[429] Dr Keith Suter, 'The International Court of Justice' (Global Directions) Available at: http://www.global-directions.com/Articles/Global%20Politics/InternationalCourtofJustice.pdf Last accessed July 2017.
[430] *Ibid.*
[431] John Crook, 'The International Court of Justice and Human Rights, *Northwestern Journal of International Human Rights* (Vol. 1(1) (Fall 2004)) p. 3.

Despite the theoretical constraints on its jurisdiction and enforceability, it has been argued by some scholars that the International Court of Justice has in fact been at the forefront of advancing human rights in recent years, and arguably has carved out for itself a constitutional mandate for the UN community. If we can indeed decipher a pre-existing constitutional mandate within the ICJ itself, then a construction of an IConC could be founded upon the translation of this to a separate institution.

Crook points to the 'Conditions of Admission of State to Membership in United Nations', regarding Article 4 of the UN Charter, in its advisory opinion of 28 May 1948, to evidence this constitutional role. [432] The case and resulting advisory opinion given by the ICJ centred on the vetoes which had been imposed by numerous permanent members of the Security Council in response to 12 states' applications for admission to the UN. In interpreting Article 4 of the UN Charter, the ICJ offered clarity on the prerequisites required of states in order to gain admission to the UN. The central issue being whether existing UN member states, in being asked to consent to the admission of a certain state, may go beyond the conditions laid down in Article 4, or whether this list is indeed exhaustive.[433] The ICJ offered this understanding of Article 4:

> *'These conditions are exhaustive, and are not merely stated by way of information or example. They are not merely the necessary conditions, but also the conditions which suffice.'*[434]

This interpretation of the UN Charter not only confirms the constitutional nature of said document, but also reinforces the practicality and potential, of and for, an

[432] 'Conditions of Admission of State to Membership in United Nations' (Article 4, UN Charter) I.C.J. 63 (28 May 1948). Cited in *Ibid.* p.3.
[433] *Ibid.* (Summary of Advisory Opinion) p.4.
[434] *Ibid.* (Summary of Advisory Opinion) p. 5.

international court having a constitutional mandate. Although the ICJ has arguably made headway with regard to advancing human rights in the context of domestic exceptionalism, with a broad all-encompassing mandate across all areas of international law, it seems inevitable that the international court is incapable of grappling with the sheer magnitude of the issues within international human rights law in any ground-breaking way. Constrained by its resources, it seems foreseeable that if we continue to grant the ICJ a constitutional mandate, then progress in protecting international constitutional law and human rights may often be forced to the background, or perhaps not afforded the time and attention these issues require. Crook explains this most clearly in stating:

'There have been a few ICJ (and PCIJ) decisions significantly contributing to human rights law, but historically they have been a small part of the docket. To give an unscientific illustration, if you look at the indexes of the five recent volumes of the ICJ reports covering 1994-1997 sitting in my bookcase, you'll see very few references to "human rights". Those you do see are concentrated in dissenting or separate opinions of a few judges. Thus, human rights issues have been an intermittent and not especially important part of the Court's work.'[435]

Admittedly, where the ICJ has been confronted with multifaceted international legal issues, they have indeed taken into account human rights considerations, as they did in the case of Paraguay and Germany against the United States, relating to capital punishment convictions. [436] Although these cases concerned consular relations, they remain important precedent of the ICJ in how they have grappled with often vitriolic conflicts between the international and domestic terrains of law when

[435] John Crook, 'The International Court of Justice and Human Rights, *Northwestern Journal of International Human Rights* (Vol. 1(1) (Fall 2004)) p. 3.
[436] Vienna Convention of Consular Relations (Paraguay v United States), ICJ 248 (9 April 1998); LaGrand (F.R.G v United States), ICJ 104 (27 June 2001). Cited in *Ibid.* p.3.

human rights are at stake. In ruling in favour of Germany in the case of *LaGrand*, the ICJ granted supremacy to international law over US domestic law; the US had attempted to limit their international responsibilities relating to consular assistance which should have been afforded to the 2 foreign nationals who had been convicted of murder.[437]

'Indeed, even in the LaGrand case, the Court seemed a bit reluctant to extend the sphere of human rights. Jurisdiction over one of Germany's claims required a finding that the Convention conferred individual rights on the LaGrand brothers as a matter of international law. This led to a lively debate whether the right to consular notification was a human right. The Court declined to decide this question. It found that the Convention by its terms conferred individual rights on the brothers, and it simply did not need to decide whether these could be viewed as human rights.'[438]

Thus, we can arguably see a general reluctance to view the cases before them through the lens of human rights analyses; but this seems an inevitable by-product of the fact that the mandate of the ICJ is not exclusively one of upholding and protecting human rights- their role is inherently a balancing function between all areas of international law and politics.

It is far easier to locate instances wherein the ICJ has struggled to apply human rights considerations and concerns to the cases brought before it. One such example can be seen in the 1996 advisory opinion on 'The Threat or Use of Nuclear

[437] LaGrand (F.R.G v United States), ICJ 104 (27 June 2001).
[438] *Ibid.* at 77, para 78. Cited in John Crook, 'The International Court of Justice and Human Rights, *Northwestern Journal of International Human Rights* (Vol. 1(1) (Fall 2004)) p. 4.

Weapons', in the context of Article 6 of the ICCPR (1966) concerning the right to life.[439]

'It was vigorously argued that the use of nuclear weapons would unlawfully violate the right not to be arbitrarily deprived of law under Article 6…the Court did not buy it. It agreed that Article 6 of the Covenant applied in wartime, but found that what is "arbitrary" must be determined through the applicable "lex specialis"- the law of armed conflict.'[440]

Although these cases are not wholly located in the remit of exceptional domestic settings, this is a useful exercise in examining exactly how far the ICJ has been willing to go in the sphere of applying and prioritising human rights when confronted with these issues. What remains clear is that in the bulk of its caseload, it has far from granted primacy to human rights concerns, often preferring a balancing act between conflicting legal values and stances. Crook points towards the composition of the ICJ judges panel to explain perhaps why this may be the case, and why human rights expertise may indeed be lacking. Although the obvious exceptions of Judges Buergenthal, Higgins and Kooijmans indeed do spring to mind- for the most-part knowledge of, and experience in, international human rights law is far from the reality for most judges who are sitting (or have sat) on the ICJ.[441]

On the other hand, some legal scholars have advanced the opinion that the ICJ has proven proactive in confronting human rights issues, in fact aided by the interdisciplinary nature of their mandate and work- its broad mandate acting as a blessing in disguise:

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[439] 'Legality of the Threat or Use of Nuclear Weapons' ICJ 240 (8 July 1996). Cited in *Ibid.* p. 4.
[440] *Ibid.* para. 25.
[441] John Crook, 'The International Court of Justice and Human Rights, *Northwestern Journal of International Human Rights* (Vol. 1(1) (Fall 2004)) p. 7.

'Thus, the court has had an abundant opportunity to contribute an important jurisprudence to the international law of human rights in such diverse fields as: genocide, race discrimination, self-determination, immunities of experts, consular access, belligerent occupation, nuclear weapons... Nevertheless, the Court is not a "human rights court". [442]

On balance, it is my view that we are faced with an international court which has notably attempted to carve out a constitutional role for itself, and has largely proven successful in doing so, but has failed to respond appropriately to human rights claims brought before it. Hindered by a broad and all-encompassing mandate, personnel who may not be experienced or well-versed in the ambit of international human rights law, and limited jurisdiction, it certainly seems as though the ICJ has not equipped itself with the necessary tools to confront the increasingly tumultuous situation of human rights abuses seen by states.

D. The Case of the Hegemon: The United States and the ICJ

'Since 1946, the United States has had an uneasy relationship with the International Court of Justice (ICJ or World Court). On the one hand, the United States embraces the rule of law within its own society and, in principle, within the international system of states...on the other hand, the United States has never been willing to submit itself to the plenary authority

[442] Sandy Ghandhi, 'Human Rights and the International Court of Justice: The Ahmadou Sadio Diallo Case' *Human Rights Law Review* (Vol 11(3)) (2011) p. 528.

of the Court, and has typically reacted negatively to decisions by the Court that are adverse to US interests.'[443]

The United States notably withdrew their consent to the Court's compulsory jurisdiction in 1986, having refused to participate in the proceedings brought against them in the case of Nicaragua in 1984, relating to the use of force and violating the sovereignty of another state.[444] At the heart of the discrepancy between the US's official position and their often rather different actions, as advocated by Professor Sean Murphy, is their attitude towards sovereignty more generally, and their innate exceptionalism in international relations with other states. Professor Murphy most clearly demonstrates this in stating that:

'The United States operates on the basis of conflicting principles with respect to whether states should be treated as equal sovereigns or as units characterised by inescapable power differentials. While the United States historically has articulated a desire for cooperation with other states as co-equal sovereigns- and, indeed, has been in the vanguard in many respects in the promotion and development of international law and institutions built around the concept of sovereign equality- the United States has innate historical and cultural characteristics that push it

[443] Sean Murphy, 'The United States and the International Court of Justice: Coping with Antinomies' (George Washington Law Faculty Publications, Cesare Romano, ed., 2008) p. 1

[444] *Nicaragua* v *United States* ICJ 14 (27 June 1986). Cited in *Ibid.* p. 1.

toward an attitude of "exceptionalism" in its foreign policy, claiming itself entitled, formally and informally, to be treated differently from other states.'[445]

This is further exacerbated by the conflict between US domestic law and the status of international law which may challenge its application and enforceability. The interplay between the domestic and the international spheres of law, exacerbated further by the hegemonic rhetoric and double standards concerning sovereignty, have rendered the United States a troublesome state when it comes to their interaction with the ICJ. The result of these discrepancies and conflicts between the hegemon and the ICJ has arguably hindered the reputation, legitimacy and enforceability of the ICJ.

At the outset, with the creation of the ICJ's predecessor, the Permanent Court of International Justice (PCIJ), the United States stood at the forefront of advocating for its construction. Indeed, as early as 1907, at The Hague Peace Conference, the US had argued for the creation of a similarly-mandated court for the international stage. [446] Although at the fore of its establishment, the US has long distanced itself from its application.

'Throughout the life of the PCIJ from 1922 to 1945 – during which time the court issues 27 advisory opinions and 32 judgments- the United States never participated in any litigation before the court, although an American judge always served on the Court.'[447]

[445] Sean Murphy, 'The United States and the International Court of Justice: Coping with Antinomies' (George Washington Law Faculty Publications, Cesare Romano, ed., 2008) p. 2.
[446] *Ibid.*
[447] *Ibid.* Footnote 25.

When the US joined the United Nations, it by extension became a party to the ICJ Statute, in line with Article 93 of the UN Charter.[448] Despite having argued for its creation, albeit in a different form, for decades, out of a total of 105 contentious cases which were brought to the ICJ between 1964 and 2004, the United States was involved as a party on 21 occasions (10 as applicant). Pivotally, 'no other state has appeared before the Court so frequently.' [449]

Perhaps most poignantly, if we look to the stance of the US with regard to the ICJ's Advisory Opinion on the Israeli Wall, we can decipher this US exceptionalism most markedly. In December 2003, the General Assembly requested an advisory opinion from the ICJ on 'the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory.' [450] The Resolution by the GA which brought about this request was received interestingly by the international community: 90 votes in favour, 74 abstentions and 8 oppositions (one of which was from the US). [451] The US stance on the Israeli-Palestinian conflict was one of diplomacy, spearheaded by certain superpower states, of which it was of course one.

'The United States opposed submitting this matter to the World Court because doing so could intrude upon the unique ability of the major powers to influence and shape the peace process.' [452]

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[448] UN Charter, Article 93: 'All members of the United Nations are ipso facto parties to the Statute of the International Court of Justice'.

[449] Sean Murphy, 'The United States and the International Court of Justice: Coping with Antinomies' (George Washington Law Faculty Publications, Cesare Romano, ed., 2008), Table 3.

[450] General Assembly Resolution ES-10/14 (December 12, 2003) Cited in *Ibid.*

[451] *Ibid.*

[452] Sean Murphy, 'The United States and the International Court of Justice: Coping with Antinomies' (George Washington Law Faculty Publications, Cesare Romano, ed., 2008) p.41.

However, the US did not frame their legal analysis in such a way, they instead argued that the ICJ did not have jurisdiction to decide on the dispute, as the relevant parties to the dispute had not consented to said jurisdiction.[453] It furthermore advanced the position that one of the parties to the dispute had not even been formally recognised by the UN as a sovereign state. The ICJ, determined that answering these questions would not jeopardise any peace process and gave the opinion that Israel was indeed violating international law by building a barrier between themselves and the Occupied Palestinian Territory. Although the ICJ granted itself the jurisdiction to proceed with the case and giving a resulting advisory opinion, its recognition and reception from the international community and Israel in particular, was somewhat overshadowed by the position of the US.

On the whole, however, despite the ICJ largely mirroring the views of states which the US often disagrees with- this has in turn strengthened its position and recognition amongst these states, even if that has been done at the expense of alienating the hegemon.[454] Although it is my belief that strengthening the ICJ with a more constitutional mandate would prove futile, we should not be discouraged by the lack of US involvement in international courts, most notably the ICJ, as the success of the institution is not wholly contingent on the hegemon. Furthermore, if history has taught us anything, we can be sure of the natural ebb and flow in who this hegemon is- our international structures must not be too-easily influenced and tailored to one state in particular for precisely this reason. Hegemony may fluctuate,

[453] Written Statement of the United States of America, paras 3.3 – 3.10 (filed 30 January 2004), Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (ICJ, 9 July 2004). Cited in *Ibid.* p. 41.

[454] Sean Murphy, 'The United States and the International Court of Justice: Coping with Antinomies' (George Washington Law Faculty Publications, Cesare Romano, ed., 2008) p.57.

but international law and its mechanisms must prove to withstand the test of time, we merely must empower them to do so.

V. Diagnosing the Flaws in International Legal Mechanisms

Generally, I must concur with Fitzpatrick (2003), who asserts that one of the fatal flaws in the international legal mechanisms relating to human rights protections under exceptionalism is the fact that there is no permanent mechanism or body in place which monitors derogations specifically at the point at which they arise. The monitoring is largely sporadic and due to resource and funding limitations, is incapable of being sufficiently thorough and in-depth for all the states which require it.[455] It was similarly the stance of the aforementioned UN Special Rapporteur that:

'*there be permanent monitoring of states of emergencies and derogations, including a mechanism enabling the Committee to maintain under consideration those countries of relevance.*'[456]

[455] Joan Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights*'* 14 *European Journal of International Law* 241, p. 263 (2003).
[456] Special Rapporteur's 10th report, para 12, p.187. Cited in: Scott Sheeran, 'Reconceptualising States of Emergency under International Human Rights Law: Theory, Legal Doctrine and Politics' *Michigan Journal of International Law* Vol. 34(3) (2013) p. 524. Available at: http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1000&context=mjil Last accessed July 2017.

To summarise, the international legal sphere is limited in its capacity to act as a watchdog over states during periods of exceptionalism, authoritarianism or 'states of emergency', on account of the consent and sovereignty doctrines which run to the very heart of international law and all its institutions and mechanisms. We ultimately cannot question it without fracturing the structure of our international community, but equally we cannot merely accept that a lack of consent from states equates to a legal vacuum within which state actions remain largely unchecked.

International law has proven itself to be largely ill-equipped to deal with these conflicts between sovereignty and human rights protections, where the former grants states the ultimate power to deviate from the latter at will:

> *'The United Nations Charter is based on a fundamental contradiction, which has prevented the emergence of a global community founded on moral values: it preaches the development of international law, but guarantees a definition of sovereignty that prevents any progress on that law. Attempts to impose international law on a sovereign state are timid, made in full knowledge that the sovereign will have the last word. This has led to a worldwide culture of impunity, based on the principle of immunity.'*[457]

Likewise, we are limited in our ability to question the overarching concept of the sovereignty of states, in much the same way- sovereign states have the authority to determine when they face a 'threat to the life of their nation', as it remains a fundamental right of states to defend themselves from outside-interference. Thus, it is for states to determine when they are under threat, usually on account of war, and interfering with their right to make this determination would be an over-extension

[457] Monique Chemillier-Gendreau, 'How to Enforce Guarantees of Freedom: The Court of Democracy' (September 2013, Le Monde Diplomatique). Available at: http://mondediplo.com/2013/09/02democracy Last accessed July 2017.

of the mandate and jurisdiction of the international community. Thus, although we cannot be wholly preventative in halting a state's demise into authoritarianism, exceptionalism or other constitutional crises- the international community must equip itself to react to it, set parameters within which it must act and impose model standards which must be complied with in terms of human rights protections. Only then can we refrain from the hypocrisy of legitimising 'states of emergency' and exceptionalism, and thus add to their perpetual nature, on the international stage.

We must not provide a framework to allow for states to deviate from universal human rights protections and the rule of law, instead we must construct creative ways to ensure greater compliance, and not merely attempt to place exceptionalism within our systems and mechanisms which have been designed for 'states of normalcy'.

As the former United Nations Commissioner for Human Rights, Navanethem Pillay has commonly-asserted, human rights treaty bodies are in a situation of crisis themselves, largely unsustainable in their current form, she has thus called for a strengthening of the existing system. Although her focus largely lay in the under-reporting of state parties, and general neglect of their international human rights obligations- her analysis and concerns can be easily transferred and applied to our analysis of human rights protections under exceptionalism, as there are strands of commonality between the two, namely non-compliance, under-reporting, increasing derogation and limitation with tenuous claims to justification, if at all. Pillay's understanding of the current predicament of international human rights law and her recommendation to states and the international community as a whole, largely mirrors my own and reinforces my proposal for an IConC, as an effort to strengthen the core of the existing mechanisms:

'We stand at a critical juncture. To appreciate it fully, let us take a step back in time to recall the foresight and courage of the drafters of the treaties who established this extraordinary system of legally binding commitments by States undertaken voluntarily in the interest of their own people. The treaties codify universal values and establish procedures to enable every human being to live a life of dignity, by accepting them, States voluntarily open themselves to a periodic public review by bodies of independent experts. But by resigning ourselves to the "inevitability" of non-compliance and inadequate resources, the system was left to suffer a long history of benign neglect to the point where, today, it stands on the verge of drowning in its growing workload…we cannot let this be.'[458]

Pivotally, through expanding human rights treaties in specifically-mandated treaties and norms, we have largely fragmented the key tenets of the UN Charter (1945) and UDHR (1948), which were the starting-point and back-bone of all the international human rights instruments which succeeded them. To reinforce said back-bone and move forward with human rights protections, both generally and for our purposes, during periods of exceptionalism, we must 'take a step back' to where we started, and create an institution which reinforces these foundations, in order to stabilise the organs which have been constructed upon it- namely, through the construction of an International Constitutional Court.

[458] Navanethem Pillay, 'Strengthening the United Nations Human Rights Treaty Body System: A Report by the United Nations High Commissioner for Human Rights' (United Nations Office of the High Commissioner, June 2012) p.94. Available at: http://www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBStrengthening.pdf Last accessed July 2017.

A. Failure of International Law to Pierce the Shield of Secrecy in Terrorism Cases

'The shadowy world of secrets and lies associated with intelligence agencies has always coexisted uneasily alongside the rule of law, individual freedoms, and checks on government power favoured by democracies.'[459]

As we have witnessed in our previous analysis of exceptionalism in the domestic realm, one of the most contentious examples of this can be seen in the wake of 09/11, with regard to counter-terrorist strategies. The international community has attempted to hold governments accountable for their actions and policies which contravene international human rights laws, but with increasing secrecy, and increased references made to privileges and immunities, this is the new terrain that international law must work within.[460] As such, these new dynamics, in this instance within the context of terrorism cases, is worthy of our attention.

In April 2002, Binyam Mohamed was arrested in Pakistan, whilst attempting to return to his legal residence, the United Kingdom. He was subsequently passed to the United States FBI and CIA where he was interrogated without receiving access to a lawyer, for 4 months. Following this, he then was flown to Morocco where he was further incarcerated for 18 months and subject to torture and further interrogation by Moroccan intelligence services. [461] In 2004, the CIA then transported him to a secret US detention facility in Afghanistan, coined 'The Dark

[459] Rebecca Sanders, '(Im)Plausible Legality: The Rationalisation of Human Rights Abuses in the American "Global War on Terror"' *The International Journal of Human Rights* Vol.15(4) (2011) p.605.

[460] Jeffrey Davis, 'Uncloaking Secrecy: International Human Rights Law in Terrorism Cases' *Human Rights Quarterly,* Vol. 38(1) (February 2016) p. 58.

[461] *Mohamed* v *Jeppesen* Dataplan *Inc* 539 F. Supp. 2d 1128, 1130 (N.D. Cal 2008) Cited in *Ibid.* p. 59.

Prison', for several months before eventually being transferred to Guantanamo Bay. During his time in US custody:

> *''he was kept in "near permanent darkness" and subjected to loud noise, such as the recorded screams of women and children, 24 hours a day. Mohamed was fed sparingly and irregularly and in 4 months he lost between 40 and 60 pounds.'*[462]

In 2005, a Military Commission in the US formally charged Mohamed with conspiracy on account of Al Qaeda allegedly training him to detonate bombs in the US. A confession was alleged to have been made, but Mohamed claimed that this had been obtained by way of torture. To prove the accuracy of his claim he needed the support of the British security forces, who had questioned him whilst imprisoned in Afghanistan, and who he believed, had sufficient evidence to prove that he had been tortured. However, the British government refused to hand-over these documents on the basis of 'public interest immunity'.[463] Although he was released back to the UK in 2009,

> *'Binyam Mohamed's litigation in the UK and US demonstrates the tension between national security interests and international law, as well as the transnational nature of counterterrorism operations and accountability efforts.'*[464]

As a result of the inevitability of the conflict between national security and international standards of human rights protections, international law has struggled to grapple with this interplay in the wake of 09/11 national security policies, as we have witnessed in our previous discussion. Legal doctrines often exist in the domestic domain to protect states against potential suits arising against them

[462] *Mohamed* v *Jeppesen Dataplan Inc* 614 F.3d 1070, 1074 (9th Cir. 2010) Cited in *Ibid.* p. 60.
[463] Jeffrey Davis, 'Uncloaking Secrecy: International Human Rights Law in Terrorism Cases' *Human Rights Quarterly,* Vol. 38(1) (February 2016) p. 60.
[464] *Ibid.* p. 60.

following particular practices or actions invoked in the name of national security, but often contrary to human rights obligations. In the UK, as we saw in the case of Mohamed, this took the form of the 'public interest immunity' doctrine.

'The danger, of course, is that states use these secrecy doctrines to establish impunity for human rights violations, criminal behaviour, corruption or incompetence.'[465]

Resultantly, those who fall victim to counter-terrorist legislation and policies often fall outside the remit of international legal protections on account of such privileges and immunities. In the case of Mohamed, the documents were eventually released on account of the inauguration of President Obama in the US, and thus the changes made to intelligence-sharing agreements between the US and UK. Having disclosed the documents, evidence had thus surfaced regarding the methods of torture used against Mohamed during the period of US incarceration. [466]

''The transnational implications of US pressure regarding the state secrets privilege may be that even if other nations' courts use a narrower standard for the privilege, those standards may be undermined if the US government uses its considerable clout to pressure governments to claim state secrets in cases where US government actions are implicated.'[467]

What is especially interesting in such cases as these is the reference made to international law, or perhaps the lack of recognition of such. In the numerous rulings in the case of Mohamed in the US, judges did not refer to international law once. As such, the treatment of national security and state secrets in the US context is clearly deemed to be of higher importance and ultimately elevated above the

[465] *Ibid.* p. 61.
[466] *Ibid.* p. 63.
[467] Sudha Setty, 'Litigating Secrets: Comparative Perspectives on the State Secrets Privilege' *Brooklyn Law Review* Vol 75 (2009) Cited in *Ibid.* p. 64.

ambit of international law and in line with this, international legal obligations. This US tendency to block litigation on the basis of state secrecy was catalysed in the case of *Totten* v *US* (1875),[468] wherein the family of a spy brought a suit against the US for failure to pay in exchange for the services the spy rendered. The Court threw out the claim, as it would 'inevitably lead to the disclosure of matters which the law itself regards as confidential.'[469] Later the Supreme Court of the US would rule to bar all cases if:

'*the subject matter of the action…[was] a matter of state secret'.*[470]

If we look to the international legal domain and see whether we do indeed have provisions to protect against such injustices, we can indeed decipher formal legal protections in place. For example, the ICCPR requires that states provide effective remedies for violations, and state secrets or special doctrines cannot be invoked to negate this right to an effective remedy.

'As the Covenant's implementing body, the Human Rights Committee, has held that even if a state "may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies" during a state of emergency, it "must comply with the fundamental obligation…to provide a remedy that is effective".'[471]

In *Rodriguez* v *Uruguay*, the Human Rights Committee ruled that Uruguay's amnesty law was a violation of the ICCPR, on account of its conflict with granting

[468] *Totten* v *United States* 92 US 105 (1875).
[469] *Ibid.* at 107.
[470] *United States* v *Reynolds* 345 US 1, 11 n. 26 (1953).
[471] General Comment No. 29: States of Emergency (Article 4) Adopted 31 August 2001 UN GAOR, Hum. Rts. Comm., 1950th mtg. Cited in: Jeffrey Davis, 'Uncloaking Secrecy: International Human Rights Law in Terrorism Cases' *Human Rights Quarterly*, Vol. 38(1) (February 2016) p. 74.

an effective remedy for ICCPR violations.[472] Secrecy doctrines may indeed be used by states, but have to be proportionate to the public interest concern at play and be the least restrictive as possible. The Convention Against Torture (CAT) goes even further in its scope to ensure that states investigate torture allegations and punish perpetrators.[473] The overarching precedent advanced by the international community is thus:

'The use of secrecy doctrines cannot, therefore, eliminate the right of the victim, his or her family, or society to know the truth about human rights violations.'[474]

The prohibition on torture is absolute and thus non-derogable, according to the Convention against Torture (CAT) and ICCPR, alongside being deemed a *jus cogens* peremptory norm by the international community. It is therefore most worrisome that out of the more than 120 US federal decisions on state secret privileges, not one considered the discrepancy between these privileges and violations of international law. [475] Although US law provides for redress for victims of torture etc., formally, these avenues are closed in cases where state secret privileges have been invoked. Although some scholars, namely Jack Snyder and Leslie Vinjamuri, have argued for the need for amnesty laws in states transitioning from authoritarian rule or civil conflict, the dominant discourse appears to be the acceptance that human rights accountability should be prioritised.[476] Having clearly identified the dangers of the blanket application of state secret privileges, ultimately:

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[472] *Communication No 322/1988,* Submitted by Hugo Rodriguez. (adopted 9 August 1994) UN GAOR, Hum. Rts. Comm., 51st Session. Cited in *Ibid.* p. 74.
[473] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), adopted 10 December 1984, GA Res 39/46. Cited in *Ibid*. p. 75.
[474] *Ibid.* p. 76.
[475] *Ibid.* p. 79.
[476] Jack Snyder and Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' *International Security Journal* 28(5) (2003). Cited in:

'it is only through embracing human rights law that meaningful national security can be attained.'[477]

Importantly, in this interplay between national security and human rights protections, we can decipher a 'shield' of denial by states. As advanced by Cohen, he explains how violations are justified through:

'asserting the righteousness of a cause, claiming emergency necessity, blaming and dehumanising the victim, making advantageous comparisons with others and rejecting universal standards.'[478]

The most concerning for many legal scholars is this tendency to dehumanise certain persons, framed as the '*homo sacer',* in order to evade human rights obligations. According to Sanders (2011) and Cohen (1996), this method of framing deviations and abuse through the lens of 'plausible legality', acts as a legal loop-hole through which responsibility can be evaded.

'Plausible legality is a form of what Cohen calls "interpretive denial". It reframes meanings, employs euphemisms and legalisms, fudges lines of responsibility, and claims abuses are isolated incidents.'[479]

Some abuses are so blatant and universally-condemned that states must employ exceptional legal interpretation and lines of defence in order to justify their actions.

Leigh Payne, Francesca Lessa, Gabriel Pereira, 'Overcoming Barriers to Justice in the Age of Human Rights Accountability' *Human Rights Quarterly* Vol 37(3) August 2015) p. 732.

[477] Jeffrey Davis, 'Uncloaking Secrecy: International Human Rights Law in Terrorism Cases' *Human Rights Quarterly,* Vol. 38(1) (February 2016) p. 84.

[478] Stanley Cohen, 'Government Responses to Human Rights Reports: Claims, Denials and Counterclaims' *Human Rights Quarterly* Vol.18(3) (1996) cited in: Rebecca Sanders, '(Im)Plausible Legality: The Rationalisation of Human Rights Abuses in the American "Global War on Terror"' *The International Journal of Human Rights* Vol.15(4) (2011) p.612.

[479] *Ibid.* p. 613.

Thus, states construct a façade of legality, bound together in carefully-constructed legal rhetoric.

'It attempts to legalise the exception without publicly suspending the existing order. It aspires to reconcile the normally irreconcilable – to permit the impermissible without fully admitting the move.'[480]

This façade is at the crux of the inherent incompatibility between the existing model of international human rights standards and models, and the practice of exceptional states and governments; the mechanisms of international human rights law are largely susceptible to this 'interpretive denial' by states. Thus, we require an institution which is equipped and empowered to evaluate and concretise the meanings which have been so broadly manipulated in the interests of states, by states. The overarching destabilising factor seems to be related to an inherent questioning of legitimacy in the ambit of international human rights law, and thus a void has emerged within which states and governments reinterpret the human rights standards and obligations in their favour in order to 'save face' formally, and yet prevent the international judicialization of their domestic system of human rights.

Let us first look to briefly reiterate the legal loopholes which have materialised in recent years, and then assess how we can strengthen the international human rights judiciary, in order to legitimise these weakening models and standards.

'As Lichtblau notes, according to the architects of post-09/11 policy, "the rule of law still had to be followed…but just what those rules really meant was often malleable, subject to twisting, flexing and reinterpreting so long as the tactics were

[480] Rebecca Sanders, '(Im)Plausible Legality: The Rationalisation of Human Rights Abuses in the American "Global War on Terror"' *The International Journal of Human Rights* Vol.15(4) (2011) p. 613.

justified to stop another attack". In so doing, plausible legality hides rather than highlights derogations from the rule of law.'[481]

B. Navigating Legal Loopholes: 'Plausible Legality' in Action

In the wake of 09/11, it is interesting to look at how the United States, in particular, confronted this interplay between the domestic security policies and international human rights standards, especially with regard to legislative drafting and uncovering and thus manipulating, legal loopholes. Considering the fact that the way in which the US responded to terrorist threats acted largely as the standard reaction, which other states subsequently mirrored, it seems inevitable that the US remains the centre of our analysis on exceptionalism in the context of legislative interpretation. At the forefront of this analysis, therefore, are the actions and decisions of the Office of Legal Counsel (OLC) at the US Department of Justice. Arguably the most profound can be demonstrated in the 2002 decision by the aforementioned, often referred to as the 'torture memos', the first of which argued that the definition of torture, must be akin:

'*in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.'*[482]

[481] Eric Lichtblau, *Bush's Law: The Remaking of American Justice* (Knopf Doubleday Publishing Group, 2009) p. 7 Cited in: Rebecca Sanders, '(Im)Plausible Legality: The Rationalisation of Human Rights Abuses in the American "Global War on Terror"' *The International Journal of Human Rights* Vol.15(4) (2011) p. 613.

[482] Jay Bybee, 'Standards of Conduct for Interrogation under 18 U.S.C. S2340-2340A' (1 August 2002, US Department of Justice, Office of Legal Counsel) p. 1. Available at: http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf Last accessed July 2017.

The legal argument propounded by the US government lawyers was that there may indeed be treatment of persons required to prevent terrorist acts, which may produce pain and suffering, but which on balance do not contravene domestic US law concerning cruel, inhuman or degrading treatment. However, the standard of torture, as advanced by CAT is clear in stating that 'torture':

> *'means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'*[483]

Importantly, the CAT standards on interpreting what constitutes torture were implemented by Sections 2340-2340A of Title 18 of the US Code.[484] But the translation of international standards on torture were reinterpreted by US government legal advisors to require such a severity of pain inflicted, that the threshold upon which CAT could be invoked was raised to a largely unobtainable level for most cases. By delimiting the scope of application of the CAT, the US was

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Cited in: Rebecca Sanders, '(Im)Plausible Legality: The Rationalisation of Human Rights Abuses in the American "Global War on Terror"' *The International Journal of Human Rights* Vol.15(4) (2011) p. 613.

[483] Convention Against Torture, Article 1.

[484] Jay Bybee, 'Standards of Conduct for Interrogation under 18 U.S.C. S2340-2340A' (1 August 2002, US Department of Justice, Office of Legal Counsel) p. 1. Available at: http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf Last accessed July 2017. Cited in: Rebecca Sanders, '(Im)Plausible Legality: The Rationalisation of Human Rights Abuses in the American "Global War on Terror"' *The International Journal of Human Rights* Vol.15(4) (2011) p. 613.

well-placed to violate international human rights on the grounds that the cruel treatment used did not amount to the necessary intensity to warrant a violation, aided by the inherent ambiguity of such a term as 'necessary intensity.' [485] Ultimately, the benchmark could not be met unless the treatment amounted to death or permanent physical damage- thus, not taking into account the vast array of possible instances of cruel, inhuman or degrading treatment, instead limiting the application of human rights law to the furthest end of the spectrum of possible abuses, and even then, with caveats and defences available. Resultantly, such practices as confining someone in a box, sleep deprivation or waterboarding were deemed to be outside of the remit of the US understanding of 'torture' practices.

Taking for example, waterboarding, it was argued that the simulation of drowning did not reach such a severity that it constituted 'physical pain':

'The waterboard is simply a controlled acute episode, lacking the connotation of a protracted period of time generally given to suffering. [486]

Therefore, although waterboarding itself constitutes a threat of death, as it is akin to drowning, the US lawyers would not interpret it as meeting the necessary threshold of 'severity' in terms of pain. In 2007, waterboarding was removed from the official list of US interrogation practices, but whether its usage continued is unclear. What is clear to see, however, is that the US legislative advisors crafted international human rights law on torture in such a way as to ensure it could be used if necessary,

[485] *Ibid.* p. 1.

[486] Jay Bybee, 'Memorandum for John A. Rizzo, Acting General Counsel of the Central Intelligence Agency: Interrogation of Al Qaeda Operative' (US Department of Justice, Office of Legal Counsel, 1 August 2002) p.10 Available at: https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-bybee2002.pdf Last accessed July 2017.

without undermining its legality or setting itself up for potential accountability for abuse.

Accompanying such legislative reinterpretation of international standards, the US position on torture was similarly manipulated through arguing that even the watered-down version of Section 2340A was not deemed to be applicable to enemy combatants, due to the inherent conflict with the President's Commander-in-Chief powers.

'We find that in the circumstances of the current war against Al Qaeda and its allies, prosecution under Section 2340A may be barred because enforcement of the statute would represent an unconstitutional infringement of the President's authority to conduct war.'[487]

Such an example of creative legal interpretation by the US serves as evidence of the recognition that although the US largely deviated from the international standards on torture, for example, they still felt the need to maintain some degree of legitimacy and mitigate the possibility of being held accountable for their potential violations.

'*It reflects the difficulty of literal denial and the growth of a litigious culture that restrains exception.*'[488]

[487] Jay Bybee, 'Standards of Conduct for Interrogation under 18 U.S.C. S2340-2340A' (1 August 2002, US Department of Justice, Office of Legal Counsel) p. 1. Available at: http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf Last accessed July 2017. Cited in: Rebecca Sanders, '(Im)Plausible Legality: The Rationalisation of Human Rights Abuses in the American "Global War on Terror"' *The International Journal of Human Rights* Vol.15(4) (2011) p. 613.

[488] Rebecca Sanders, '(Im)Plausible Legality: The Rationalisation of Human Rights Abuses in the American "Global War on Terror"' *The International Journal of Human Rights* Vol.15(4) (2011) p. 614.

The result is something that Sanders describes as 'shallow legality'- it largely served to brandish the lawyers who drafted the provisions with the same potential guilt as those committing the torture abuses. Through blurring the potential for legal responsibility, a broad immunity was crafted, utilising the façade of judicial competence and reverence to 'cloak the policy with a veneer of legality'.[489] For the most-part, many of these examples of 'plausible legality' remain classified documents, and are therefore outside the remit of external judicial interpretation and analysis, and thus exacerbate the efforts of international human rights lawyers to enforce standards. This 'golden shield', as Sanders describes it, is seemingly impenetrable:[490] how can we protect ourselves and the '*homo sacer'* from the resulting abuses and construct a sword capable of combating the effects of 'plausible legality'?

C. Legitimising the International Human Rights Judiciary

Having witnessed the deference states sometimes equip themselves with in order to deviate from international standards of human rights protection, we must ask ourselves why the legal structures are struggling to hold states to account for their violations. When confronted with states use of 'plausible legality', our existing international legal structures begin to crumble. It seems to be that this is only able to occur because a void in the legitimacy of the international human rights judiciary has surfaced. This has been exacerbated by the monist model in the international legal sphere and attempting to confine the exception within the norm, alongside

[489] *Ibid.* p. 614.
[490] *Ibid.* p. 619.

under-reporting of state actions and the dilution of a universal mandate through limitations, derogations and reservations to key international human rights treaties. As we have seen in our analysis, this is further hindered by creative judicial interpretation and framing of international obligations by states as a protective mechanism through which they can prevent potential accountability and maintain the veneer of legality.

Importantly, this legality is capable of being manipulated by states because the international mechanisms cannot protect against it. If states held a high regard for international human rights law and its institutions which enforce the legal obligations, then there would be no capacity for states to frame 'plausible legality'. As Follesdal (2013) advocates, the international human rights judiciary has an inherent 'legitimacy deficit'.[491] Although her understanding of this 'international human rights judiciary' includes the European Court of Human Rights and the Inter-American Court of Human Rights, it also includes the United Nations Human Rights Committee for the ICCPR (1966), which we have drawn upon extensively in our analysis.

Fundamentally, it is on account of the 'veneer of legitimacy' which the international human rights judiciary has constructed for itself, in establishing a model and standards and yet not equipping itself with the necessary tools to enforce or ensure compliance, that states are equally-placed to assert a 'veneer of legality'.

We can advocate for the need for legitimacy of the international human rights judiciary, by merely referring to our prior cases of constitutional crises where the domestic setting, usurped by authoritarian power, no longer has a democratic mandate and thus requires external judicial intervention. If the domestic judiciary is

[491] Andreas Follesdal, 'The Legitimacy Deficits of the Human Rights Judiciary: Elements and Implications of a Normative Theory' *Theoretical Inquiries in Law* Vol. 14 (2013).

acting undemocratically or not acting independently, or elections have been illegitimate- we can no longer rely on the internal infrastructures and checks and balances. This is the reasoning behind our international human rights judiciary, but its drafters were reluctant to grant them the necessary legitimacy to ensure their mandate is enforceable. During times of normalcy, it is easier to ensure compliance- but during exceptionalism, these structures crumble in protecting the '*homo sacer'*. As Follesdal explains:

> *'In order to move towards a more legitimate global basic structure we should not utterly reject the present international human rights judiciary, but rather identify areas for reform so as to make it more legitimate.'*[492]

[492] *Ibid.* p. 360.

Chapter 7: Proposing an International Constitutional Court to fill this Void: The 'Constitutionalisation' of International Law

'The events surrounding 09/11 have apparently caused a shift in international legal thinking. While in the 1990's there was much debate regarding diversity, recognition, and inclusion, the 09/11 attacks, arguably, have provoked something of a reorientation toward a search for a global or common set of values and the concomitant exclusion of those who do not share these values.'[493]

I. Vindicating an International Constitutional Institution

Having established the sheer number of vitriolic situations on the domestic level, in an array of forms, which we are capable of referring to as 'constitutional crises', this has evidenced the growing need for intervention and an increased dialogue of constitutional issues on the international level. Having also identified the limitations of existing international law both in regard to its structure and its substantive standards and mechanisms, we have proven that merely reforming the existing system may not be adequate to redressing the issue of increasing domestic

[493] Christine E. J. Schwobel, 'Situating the Debate on Global Constitutionalism', *International Journal of Constitutional Law* (2010) Vol. 8 (3) p. 635.

'constitutional retrogression'. Thus, I advocate for the establishment of a regulatory body which provides a check and balancing function, capable of acting as a watchdog over the constitutional progress and/or retrogression of states.

Through the prior analysis, I have hopefully provided sufficient evidence of the turbulent constitutional situations in many states, some of which teeter on the edge of authoritarianism as a result. To test the accuracy of my claims, I have testified my theories by using case studies from a range of states and crises, which go some way I hope, in demonstrating the extent and urgency of the issue at hand. Thus, I proceed with my proposal for confronting this spectre which we are faced with in a post-09/11 world of fear, propaganda and increasing authoritarianism. I have established through my work that we can no longer grant states, which are in the midst of a 'constitutional crisis' the jurisdiction to determine their own fate and the fate of their often ill-informed, fearful populace. We must be preventative in our actions and grant the international community sufficient power and jurisdiction to allow an impartial judge to act as a watchdog over such struggling states. In this way, I strongly stress the urgency in creating an IConC to fill this void in the international legal sphere and prevent future abuse by authoritarian states and their destructive policies.

In order to put forward such a proposal, I must lay the theoretical foundations for such a body. International institutions and international law are increasingly in the firing-line of criticisms over the disassociation of states with these bodies and laws, and thus their irrelevance in a 21st century world of isolationist and nationalistic states. It is for precisely this reason that we should strengthen our existing institutions and bolster their power with new institutions and legal norms in order to concretise and reinforce the system as a whole and re-establish the respect and recognition that they were once afforded. International law has proven over decades

that it is capable of moulding itself to a changing world, and the 21st century is no exception. Admittedly, the 'War on Terror', has catalysed new legal issues and ambiguities which require the attention of international lawyers. Some legal commentators argue that we are witnessing the decline of international law, but this appears to be an over-simplification of the situation, a scapegoat justification for an easy route out. Instead, we must think creatively and truly question what the international community is lacking and fill the void.

We are increasingly witnessing the destruction of decades of progress by international institutions and international law; from the outset, it was their mandate to prevent 'crisis' situations from deteriorating into full-scale war and/or human rights violations, their mandate is still clear, but their power and jurisdiction is wavering. It is the duty of international lawyers, I assert, to work to empower these structures and institutions with the necessary tools to fulfil their mandate.

On this basis, I advocate for the creation of an IConC; by acknowledging the pitfalls of our existing mechanisms, we are capable of deciphering the power gap which authoritarian states and states in the midst of 'constitutional crises' are exploiting to their advantage. If we merely add a further international legal mechanism to the existing structure, then I reluctantly admit that it would probably prove futile and suffer the same fate of unenforceability that have rendered other mechanisms 'toothless'. We need an institution which is ground-breaking in its mandate, its objectives and its power. An institution which stretches sovereignty and jurisdiction to their limits, akin to that of the newly-established ICC. If we look to the common denominator of issues which face all international mechanisms to varying degrees, it is the fact that a change of political leadership or direction by a state, can bring about a 'constitutional crisis', isolationist and nationalistic policies and a complete disconnect between that state and the international community and international law.

If respect and recognition of international law are so heavily dependent on stable, democratic states with favourable political leaders, then we need an institution in place to ensure the aforementioned conditions are met and maintained by states, in order to ensure continued respect and conformity with international standards. In this way, an IConC would act as a foundational protective mechanism to ensure the success and continuity of international law as a whole.

Having hopefully provided a convincing argument for the overarching need for the construction of an IConC, alongside the deficiencies in the existing international institutions and legal orders which have created the void we see before us, we must turn to gauge how plausible it would be for such an institution to satisfy the necessary prerequisites to translate it from a purely abstract ideal, to a feasible solution. Thus, we turn to confront the key tenets of international law and its institutions and pose the question of whether we are capable of moulding a body of international constitutional legal doctrine, or a constitution from the existing structures. Can we translate the theoretical proposition into a fully-functional reality?

II. 'Constitutionalising' International Law

'[T]he legal project at the basis of global constitutionalism is, in the long term, the only realistic alternative to war, destruction, the rise of a variety of fundamentalisms, ethnic conflicts, terrorism, an increase in famines and general misery.'[494]

[494] Luigi Ferrajoli, 'Beyond Sovereignty and Citizenship: A Global Constitutionalism' in Richard Bellamy (ed.) *Constitutionalism, Democracy and Sovereignty: American and European Perspectives* (Aldershot, 1997) p. 159.

Increasing international legal dialogue has centred upon whether an international or global constitution is indeed emerging, to what extent and what role the potential 'Constitutionalisation' of international law could carve out for itself. As states have become more closely interconnected, we have seen a surge in the usage of terms such as 'global governance', 'international community' and a 'global rule of law'.[495] Although we can see a parallel trend in the detachment of some states from such a rhetoric, and increasing nationalism and independence from regionalism or supranationalism, for the most part the benefits of engaging with this international rhetoric are sufficient to entice most states into participating. I assert that it is due to the fragmentation and gaps in existing international legal mechanisms, that some states are capable of disengaging in the first place- if the model appears ill-equipped and embarking on a downward spiral into its own demise, then it seems inevitable that states begin to 'abandon ship', so to speak. The solution, it seems to me, lay in greater cooperation between states, reopening dialogue and moving forward together in the face of global problems.

'One legal umbrella that has been suggested as an expression of greater cooperation and, possibly, as a means to manage fragmentation is that of global constitutionalism'.[496]

Although differing models and understandings of global constitutionalism do indeed exist, guided by the work of Christine Schwobel, who offers 4 possible 'visions' of a global constitution (social, institutional, normative and analogical constitutionalism), we will focus predominantly on 'social constitutionalism', oft

[495] Christine E. J. Schwobel, 'Situating the Debate on Global Constitutionalism', *International Journal of Constitutional Law* (2010) Vol. 8 (3) p. 611.
[496] *Ibid.* p. 612.

referred to as the international community school.[497] This school of thought emphasises the idea that a:

> *'Paradigm shift [has] allegedly taken place, showing a move away from a sovereignty-centred system of international law to a value or individual-oriented system'*[498]

At the forefront of 'social constitutionalism' is the eminent Bardo Fassbender, who has himself argued for concretising already clearly-identifiable elements of global constitutionalism, namely through recognising the UN Charter as a global constitution.[499] Christian Tomuschat propounds a similar view, in asserting that using constitutional rules to limit political power, both international and domestic, advances peace, individual rights and the rule of law.[500] Fundamental to this understanding of global constitutionalism are the concepts of influence, accountability and participation.[501] It is this sphere of accountability where an IConC could play an important role, aided by engagement with civil society, and ultimately striving to limit the 'single locus of power'.[502]

If we move our focus to institutional constitutionalism, Anne-Marie Slaughter draws our attention to the extent of the existing interplay between the domestic and international spheres, comprised of 'government networks'.

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[497] *Ibid.*
[498] *Ibid.* p. 613.
[499] Bardo Fassbender, 'The Meaning of International Constitutional Law' in Ronald St. John Macdonald and Douglas M. Johnston (ed.) *Towards World Constitutionalism* (Martinus Nijhoff Publishers, 2005), p. 846.
[500] Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', General Course on Public International Law 281 *Recueil des Cours de L'Academie de Droit International* 237 (1999).
[501] Christine E. J. Schwobel, 'Situating the Debate on Global Constitutionalism', *International Journal of Constitutional Law* (2010) Vol. 8 (3) p. 617.
[502] *Ibid.* p.616.

'Although states still exist in the new world order, they relate to each other not only through the foreign offices but also through regulatory, judicial and legislative channels.'[503]

However, Slaughter asserts that a global constitution would not be possible unless a global government was formalised in tandem.[504] Considering the difficulties in establishing a concrete global government, she instead settles for the uncodified, more informal, use of principles and norms as a starting-point. Although many legal commentators and theorists are understandably sceptical of calls for a global government, this is indeed the direction in which the UN is already moving. According to the UN 2030 Agenda for Sustainable Development, which was adopted in September 2015 at the UN Sustainable Development Summit, reference was explicitly made in the Preamble to 'the scale and ambition of this new universal agenda'.[505] With greater zeal than ever before, we are witnessing the international rhetoric of integration, a resurgence of universalism and collective solutions to shared global problems. Although a formal global government may not exist, the trend towards this goal and increasing evidence of its eventual realisation cannot preclude the construction of a global constitution.

One of the concerns of many legal commentators has proven to be the interaction and hierarchical implications of having a potential international constitution, and

[503] Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004) p.5.
[504] *Ibid.* p.245.
[505] 'Transforming Our World: The 2030 Agenda for Sustainable Development' (A/RES/70/1), Preamble. Available at: https://sustainabledevelopment.un.org/post2015/transformingourworld Last accessed July 2017.

whether this would render domestic constitutions futile. Miguel Poiares Maduro examines this in more detail, through focusing on legitimacy. [506]

'Maduro stresses the need to legitimise de facto power in constitutional terms. He shows that the form and locus of power have changed from what was traditionally a state monopoly. Traditionally, the form of power- the constitution of a nation state- and power itself coincided in the same locus, the state. Global governance, however, has caused a shift of power to global sites.'[507]

In this way, a power shift has taken place from the domestic to the global. An inevitable by-product of this has proven to be some governments attempting to regain hold of their domestic power through a reinvigoration of authoritarianism and/or nationalism. Although a backlash can be evidenced, most states have instead engaged with the advantages of greater interconnectivity between states. However, the void of a formal global governance structure remains. If we were to establish an IConC, this would provide further impetus for such a formal institution for global governance.

However, a formal executive governance structure on the international level is not a prerequisite, in my mind, for the advancement of the constitutionalisation of international law. I align myself with Robert Uerpmann, who asserts:

[506] M. Poiares Maduro, 'From Constitutions to Constitutionalism: A Constitutional Approach for Global Governance' in Douglas Lewis (ed.) *Global Governance and the Quest for Justice* (Vol.1, Hart Publishing, 2006).
[507] *Ibid.* p. 251 Cited in: Christine E. J. Schwobel, 'Situating the Debate on Global Constitutionalism', *International Journal of Constitutional Law* (2010) Vol. 8 (3) p. 620.

'While examining the lack of such an executive authority in international law, he finds that there is, in fact, no requirement for such an authority in the international sphere…international law is a law of coordination rather than subordination.'[508]

Normative constitutionalists have further drawn on the unique character of fundamental norms in the international sphere, which apply irrespective of sovereignty or consent. [509]

'Two examples of fundamental norms are jus cogens and norms applying erga omnes.'[510]

The former, *jus cogens* norms, (or peremptory norms) can be located predominantly in Article 53 of the Vienna Convention on the Law of Treaties, and oft referred to as constitutional norms for the international community.[511] Article 53 states therein that such norms are of such a nature that 'no derogation is permitted'.[512] Even if *jus cogens* are not a global constitution in themselves, they are sure to be considered part of it, and provide yet more evidence of the existing constitutional nature of international law. As Michael Byers asserts:

'Nowhere else in the international legal system is the ability of certain rules to limit a state's ability to develop, maintain, or change norms so clear.'[513]

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[508] Robert Uerpmann, 'Internationales Verfassungsrecht' 56 *Juristen Zeitung* (2001) p. 568. Cited in *Ibid.* p.632.
[509] Christine E. J. Schwobel, 'Situating the Debate on Global Constitutionalism', *International Journal of Constitutional Law* (2010) Vol. 8 (3) p. 628.
[510] *Ibid.* p. 628.
[511] Vienna Convention of the Law of Treaties (1969), Article 53 and 64.
[512] *Ibid.* Article 53.
[513] Michael Byers, 'Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules' 66 *Nordic Journal of International Law (1997). Cited in* Christine E. J. Schwobel, 'Situating the Debate on Global Constitutionalism', *International Journal of Constitutional Law* (2010) Vol. 8 (3) p. 628.

A similar argument has been of the importance of *jus cogens* norms, based on their inherent value, and not merely their effect on state power and sovereignty- it is their ethical rhetoric which warrants them an international constitutional nature, as propounded by Erika de Wet.[514] In much the same way, *erga omnes* norms have similarly been characterised as having an inherently constitutional nature.

As further evidence of constitutionalising international law, let us turn to the proposal of Geir Ulfstein who suggested the creation of a world court of human rights, which would act as a judicial organ to implement and empower 'core values in the international community.'[515] In much the same way, and proposing a similar mandate and function to our IConC, Ulfstein argues for a world court of human rights:

'such an institution could be regarded as a "facet" of the Constitutionalisation of international law.'[516]

Indeed, references to global constitutionalism have long been asserted by legal academics. As early as 1926, Alfred Verdross published a book entitled, 'The Constitution of the International Legal Community.'[517] Drawing on the various levels and spheres of jurisdiction and general principles of international law which he elevated to be beyond the state consent model, he offered a ground-breaking alternative to the traditional sovereignty model which prevailed at that time. Later, Verdross would transpose his original idea for the constitutionalisation of

[514] Erika de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' 19 *Leiden Journal of International Law* (2006) pp.611-632.
[515] Geir Ulfstein, 'Do We Need a World Court of Human Rights?' in O. Engdahl and P. Wrange (ed.) *Law at War: The Law as it Was and the Law as it Should be* (Martinus Nijhoff Publishers, 2008) p. 271.
[516] *Ibid.* p. 271.
[517] Alfred Verdross, *Die Verfassung der Volkerrechtsgemeinschaft* (1926).

international law through general principles, to a focus on the UN Charter as a constitution for the international community.[518]

A. Deciphering a Constitutional Document

'[i]t is apparent…that the material content of the Charter of United Nations is indeed constitutional and that we are fully justified in treating the Charter as the constitution of the international community.'[519]

International lawyers have long been debating whether a document of constitutional norms has indeed surfaced naturally over time, to such an extent that we are indeed capable of asserting its existence, despite no formal recognition of such. Proponents in favour of recognising the foundational treaty of the United Nations, namely the UN Charter (1945) as the international constitutional document, include the aforementioned Bardo Fassbender and Ronald St. John Macdonald.

Making reference to the aforementioned UN 2030 Agenda for Sustainable Development, it likewise stipulates the importance of the UN Charter therein:

'the new Agenda is guided by the purposes and principles of the ***Charter of the United Nations****, including full-respect for international law.'*[520]

[518] Alfred Verdross, Bruno Simma, *Universelles Volkerrecht: Theorie und Praxis* (1984).
[519] Ronald St. John Macdonald, 'The International Community as a Legal Community' in Ronald St. John Macdonald and Donald M. Johnston (ed.) *Towards World Constitutionalism- Issues in the Legal Order of the World Community* (2005).
[520] 'Transforming Our World: The 2030 Agenda for Sustainable Development' (A/RES/70/1), (10). Available at:

In order to fulfil the prerequisites to be classified as an international constitution, many legal commentators have drawn upon the need for there to be both formal institutional elements to the constitutional document, as well as substantive provisions. The UN Charter (1945) satisfied the former in laying down the numerous organs of the UN, their individual functions, powers and mandates, and with regard to the latter largely lays down its purpose and objectives in the Preamble and Chapter 1:

'To achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction…[and] to be a centre for harmonising the actions of nations in the attainment of these common ends.'[521]

More specifically, the purpose of the UN has often been simplified into the maintenance of peace and security (Article 1(1)), the prohibition of the use of force (Article 2 (4)) and the sovereign equality of members (Article 2(1)).[522] Pivotally, the supremacy of the norms within the UN Charter is laid down in Article 103. Macdonald asserts that this provision is:

'one of the most persuasive arguments in favour of the view that the Charter is in fact a constitution.'[523]

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https://sustainabledevelopment.un.org/post2015/transformingourworld Last accessed July 2017.

[521] United Nations Charter (1945), Chapter 1, Article 1 (3-4).

[522] *Ibid.* Articles 1(1), 2(4) and 2(1).

[523] Ronald St. John Macdonald, 'The International Community as a Legal Community' in Ronald St. John Macdonald and Donald M. Johnston (ed.) *Towards World Constitutionalism- Issues in the Legal Order of the World Community* (2005) p. 862.

If we were to utilise the UN Charter (1945) as the basis of our international constitutional framework, framing general objectives and granting powers to UN organs, and empowering its substantive provisions through elevating *jus cogens* and *erges omnes* to the level of international constitutional norms, its provisions would be beyond derogation and in-keeping with the consent doctrine. In this way, we could establish an IConC to oversee the implementation of these substantive provisions, offering an accountability mechanism and avenue through which civil society could take an active role in the application of international constitutional law in the domestic sphere.

III. An International Constitutional Court: The Proposal

*'A **resort for local and international human rights organisations and political parties** in case of serious human rights violations and more particularly "the **falsification of people's will through electoral farces** held by dictatorships". '*[524]

In 1999, the former President of Tunisia, Moncef Marzouki, proposed the establishment of an International Constitutional Court, in order to 'overcome the failure of international law to deal with abuses of democracy and human rights.'[525] He argued that the dictatorship of Zine al-Abidine Ben Ali in Tunisia and the

[524] Former President Moncef Marzouki, 'Tunisia to Submit to UN Plan to Set Up International Constitutional Court' (AllAfrica.com; Washington, 11 September 2012).
[525] Laith K. Nasrawin, 'An International Constitutional Court: Future Roles and Challenges' *Digest of Middle East Studies* Vol. 25 (No 2) (2016) p. 210.

fraudulent elections which took place, demonstrated the need for an international mechanism to address cases of authoritarianism and excessive power of the executive, where the domestic setting had been compromised. Marzouki modelled his theoretical constitutional court on the International Court of Justice and the ICC, with the primary mandate of ruling on the legality of state elections. Utilising the United Nations Charter as the foundational premise for such a mechanism, he argued that there was a growing need for an institution which implemented and enforced these laws- this was, in his mind, 'the missing link'.[526]

The objective of his proposed Court would primarily be to standardise and concretise 'universal constitutional and moral principles' at first and then work for the eradication of authoritarian regimes and the breaking-down of unconstitutional power structures and political leaders.[527] In the long-term, it was his hope that all states shared common constitutional laws with respect to human rights and freedoms.

A. 1999 Recommendations, Foundations & Formalities

*'Many countries of the world have **signed international conventions and ratified treaties** guaranteeing **democracy** and **fundamental human rights**, however, there is- as yet- **no authority to ensure those commitments are respected** and **no sanctions** imposed for those who disobey them.'*[528]

[526] *Ibid.* p.211.
[527] *Ibid* p. 212.
[528] Chemillier-Gendreau (2013) Cited in Laith K. Nasrawin, 'An International Constitutional Court: Future Roles and Challenges' *Digest of Middle East Studies* Vol. 25 (No 2) (2016) p.211.

At the crux of the need for an IConC is the idea that democracy and public freedoms will remain stalled in their protection at the international level if we continue to allow the domestic level to remain unchecked. The international mechanisms should indeed reinforce domestic protections of human rights and democratic values- where the domestic domain fails, the international mechanisms should have sufficient power to intervene. The mandate of his proposed IConC, not to be confused with the ICC, would be to act as a 'regulatory body that denounces harmful constitutions, illegal charters and fraudulent elections.'[529] His conceptual IConC would adjudicate on whether to formally recognise states as democratic or not, in accordance with the UN Charter, and advise those who do not fulfil the necessary criteria- thus serving both a consultative and judicial role. In this way, Mr Marzouki believed that this would deter authoritarian regimes and emancipate civic resistance by demonstrating model states and the ideal standards of democracy, which others would strive to imitate.

Judicial oversight would be granted in determining the degree to which states are adhering to international standards of human rights, and how they are structured in terms of domestic constitutional protections. Such oversight would also extend to reviewing 'disputed constitutions and laws within member states'.[530] He asserted the need for an avenue for individual relief under the proposed IConC; often within authoritarian regimes the victims in need of redress are the citizens whose constitutional rights and freedoms have been violated. Thus, Mr Marzouki recognised the inherent need for individuals to have legal standing in the domain of international constitutional law. On this basis, he proposed that individuals could

[529] Laith K. Nasrawin, 'An International Constitutional Court: Future Roles and Challenges' *Digest of Middle East Studies* Vol. 25 (No 2) (2016) p.212.
[530] *Ibid.* p.212.

bring a claim to the IConC 'on the basis of the contravention of democratic behaviour and the international principles of human rights and freedoms.'[531]

It has been especially noted that the 'depreciation of the way national elections are held',[532] needs to be confronted by the international community. The manipulation of election results, illegal financing of election campaigns etc., are signs of 'constitutional crisis' on the domestic level, with the additional issue of undermining treaty obligations which many of these states have ratified and shown their formal commitment to. Resultantly, the proposed IConC would need sufficient power to render illegal elections invalid and the ruling regime deriving from such, illegitimate.

With regard to the question of enforcement and the widespread practice of state impunity, Professor Nasrawin, on behalf of Mr Marzouki, offered these thoughts:

'All attempts to impose rules of international law upon a sovereign state have been timid... This has resulted in an international culture of impunity, based on the principle of immunity of states towards the international law, which hinders the efficient enforcement of human rights.'[533]

Although this may well be justifiable under the historical world order of the inviolability of sovereign states, this is no longer representative of how states function and the policies they pursue: pivotally, we can no longer entrust states with an unchecked responsibility to act in accordance with constitutional values and international human rights norms. It is on this basis that we must argue for international intervention, or we may as well abandon our existing institutions, and international law altogether. I align myself, alongside Professor Nasrawin, De Sena

[531] *Ibid.* p.212.
[532] *Ibid.* p.213.
[533] *Ibid.* p.214.

and De Vittor, whom advocate for a 'balancing of values' between the competing international law principles of 'the sovereign equality of states' and the 'protection of inviolable human rights'- the balance should tilt in favour of the latter and states should be prevented from drawing upon sovereign immunity to justify their deviation from human rights protections.[534] Upon this basis, the Court's decisions would be both final and binding on the states concerned.

If we compare this with existing legal mechanisms, we can identify that it surpasses the scope and enforceability of the International Court of Justice, as the ICJ requires parties to have approved its jurisdiction in the case, and there is nothing which can ensure that a state does so. The ICC showcases a huge leap forward in terms of the extension of jurisdiction in the field of international criminal law, for certain crimes- but it remains hindered by the fact that many of the world's superpowers refuse to ratify its founding statute which grants this jurisdiction, The Rome Statute (1998). Although Mr Marzouki commends the work of the UN Human Rights Council and the Human Rights Committee, their ability to translate democratic principles and human rights into international state obligations has proven difficult. This is the void in which an IConC is best-placed to fill.

The bylaws which were drawn up for the proposed IConC stipulate that the number of judges shall be 21, and further details the mechanism for nominating candidates and their appointment. For ease of understanding, I quote Professor Nasrawin directly:

'*Each member state of the UN shall nominate one candidate, and then a committee consisting of judges of the International Court of Justice, judges of the International*

[534] De Sena, De Vittor (2005) Cited in Laith K. Nasrawin, 'An International Constitutional Court: Future Roles and Challenges' *Digest of Middle East Studies* Vol. 25 (No 2) (2016) p.214.

Criminal Court and members of the International Law Commission shall only select 42 names from the list of candidates on the grounds of integrity, competence and experience. The General Assembly of the United Nations shall elect 21 judges from the list of candidates to serve as judges in the [IConC].'[535]

In terms of determining a body of international constitutional norms, Mr Marzouki proposed that this should be comprised of 'UN Pacts and other conventions', and 'UN Resolutions consecrating the principle of democratic legitimacy and setting out the obligatory measures to be taken by states to ensure it.'[536] The aforementioned bylaws further stipulated the range of legal instruments which would be utilised by the IConC to evidence their arguments, and serve as the basis of our universal understanding of international constitutional law.[537] This included: The Universal Declaration of Human Rights (1948),[538] The Covenant on Civil and Political Rights (1966),[539] The European Convention on Human Rights (1950),[540] The Charter of the Organisation of American States (1951),[541] The American Convention on Human

[535] Laith K. Nasrawin, 'An International Constitutional Court: Future Roles and Challenges' *Digest of Middle East Studies* Vol. 25 (No 2) (2016) p. 215.
[536] Chemillier-Gendreau (2013) Cited in Laith K. Nasrawin, 'An International Constitutional Court: Future Roles and Challenges' *Digest of Middle East Studies* Vol. 25 (No 2) (2016) p. 215.
[537] Laith K. Nasrawin, 'An International Constitutional Court: Future Roles and Challenges' *Digest of Middle East Studies* Vol. 25 (No 2) (2016) p.217.
[538] The Universal Declaration of Human Rights (1948) (General Assembly Resolution 217A) Available at: http://www.un.org/en/universal-declaration-human-rights/ Last accessed July 2017.
[539] The Covenant on Civil and Political Rights (1966). Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf Last accessed July 2017.
[540] The European Convention on Human Rights (1950). Available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf Last accessed July 2017.
[541] The Charter of the Organisation of American States (1951). Available at: http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS.asp Last accessed July 2017.

Rights (1969), [542] The Inter-American Democratic Charter (2001), [543] The Constitutive Act of the African Union (2000),[544] and the Harare Commonwealth Declaration (1991). [545] We will later critique this and limit international constitutional law initially to an international constitution, the UN Charter (1945), and international constitutional norms of *jus cogens* and *erga omnes*.

Thus, we proceed to analysing the reception of the IConC by the international community, alongside the potential pitfalls of the proposal, in order to offer a riposte and fill the conceptual gaps which have materialised in recent years.

B. Initial Reception by the International Community

In 2011, Mr Marzouki restated his commitment to the creation of an IConC by forming a committee of experts on constitutional law and drafting the general mandate of his proposed International Constitutional Court and its bylaws. Later, in 2012, during a speech to the United Nations General Assembly, he again asserted the need for such an institution and asked that the international community allow for both its establishment and also grant it the jurisdiction to denounce and challenge

[542] The American Convention on Human Rights (1969). Available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm Last accessed July 2017.
[543] The Inter-American Democratic Charter (2001). Available at: http://oas.org/charter/docs/resolution1_en_p4.htm Last accessed July 2017.
[544] The Constitutive Act of the African Union (2000). Available at: http://www.achpr.org/files/instruments/au-constitutive-act/au_act_2000_eng.pdf Last accessed July 2017.
[545] Harare Commonwealth Declaration (1991). Available at: http://thecommonwealth.org/history-of-the-commonwealth/harare-commonwealth-declaration Last accessed July 2017.

the policies and actions of those on the domestic level who neglect their constitutional norms and domestic human rights legislation, and in so doing, violate international law. [546]Mr Marzouki then repeated his claims at the African Union Summit in January 2013, following which, the African Union 'agreed to study the feasibility of such an institution.'[547]

Later in 2013, International IDEA and the Konrad-Adenauer Foundation formed a symposium, in collaboration with the Office of the President of Tunisia on: 'The Creation of an IConC: Means to Prevent Grip on the Democratic Institutions.' IDEA Secretary-General Vidar Helgesen, with reference to the experiences of both Tunisia and Egypt, highlighted:

> *'the gap between the peoples' aspirations having made revolution against dictatorship and the attitude of their governments.'*[548]

Although it certainly appears as though experts in international law and constitutional law alike are in agreement with the need for, and objectives of, such an IConC- 'most agreed that further definition would be needed if such an institution was to be become a reality.'[549]

Before his presidency came to an end, and in his final push for its establishment, Mr Marzouki hosted an international conference, 'International Constitutional Court and the Requirements of Sustainability' in 2014.[550] Although in the wake of said

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[546] Institute for Democracy and Electoral Assistance, 'International Constitutional Court Proposed to Protect Democracy' (IDEA, 4 May 2013). Available at: http://ec2-174-129-218-71.compute-1.amazonaws.com/wana/international-constitutional-court-proposed-to-protect-democracy.cfm Last accessed July 2017.
[547] *Ibid.*
[548] *Ibid.*
[549] *Ibid.*
[550] Laith K. Nasrawin, 'An International Constitutional Court: Future Roles and Challenges' *Digest of Middle East Studies* Vol. 25 (No 2) (2016) p.211.

conference, promises have been made to endeavour to translate this theoretical concept into a fully-functioning mechanism, progress in its realisation has stalled.

Indeed, the public international law expert who was largely responsible for the International Law Commission's draft statute for the establishment of the ICC, Mr James Crawford, identifies the pitfalls of Mr Marzouki's proposal. In comparing the former with the proposed IConC, 'he noted that several of the key factors which led to the creation of the ICC were missing', but explained that if steps were taken to determine its feasibility and progress made to realise the proposal it was theoretically possible.[551] At the crux of the construction of an IConC, a 'large-scale mobilisation of civil society' would be required, as would 'the agreement of a core group of like-minded states to drive the process [forward].'[552] These steps toward realisation largely mirror those proposed by Mr Marzouki himself in identifying the importance of a strong civil society, coupled with a group of key states who would act as role-models in striving towards the ultimate goal of an IConC, as we saw post-WW2 in the establishment of the UN and other international institutions.

C. 1999-2017: Progress & Critiquing

In Professor Nasrawin's analysis of Mr Marzouki's proposal for an International Constitutional Court, he succinctly critiques many of the difficulties

[551] Institute for Democracy and Electoral Assistance, 'International Constitutional Court Proposed to Protect Democracy' (IDEA, 4 May 2013). Available at: http://ec2-174-129-218-71.compute-1.amazonaws.com/wana/international-constitutional-court-proposed-to-protect-democracy.cfm Last accessed May 2017.
[552] *Ibid.*

which hinder its realisation. He acknowledges the problems associated with translating the theoretical into the practical domain, and thus his analysis is largely pragmatic in nature. Predominantly, he highlights the difficulties in cultivating 'cooperation between states on both regional and international levels.'[553] Such a concern affects all international institutions in the same way, and thus should not preclude the creation of further institutions which would merely strengthen this cooperation; we should not allow the fear of non-cooperation or non-uniformity to constrain the objectives and endeavours of our international institutions. If we are overly-cautious in striving to realise an IConC, then the fear instilled in us by those who themselves fear its mandate and stand in opposition to all of the values it champions, will prove victorious. We must collectively strive for justice and the rule of law, even in the face of fear, terror and opponents who would deem it preferable to play the 'waiting game' and allow for human rights to be violated on mass in the interim. Thus, the potential fear of non-cooperation from states should not usurp our ideals and efforts to invoke positive change, we must instead find solutions when we uncover deficiencies.

He further states that there is a 'clear variation and disagreement on a unified definition of the concept of constitutional rights and freedoms between different political systems', and this therefore precludes the proposed IConC from translating into a legal reality.[554] What is deemed a constitutional right in one state, may not be considered as such in another. However, we are often too quick to forget that these hurdles were similarly confronted after WW2, and consensus was indeed found between states with the UN Charter (1945) and the Universal Declaration of Human Rights (1948). However, Nasrawin has voiced his concern over how we can

[553] Laith K. Nasrawin, 'An International Constitutional Court: Future Roles and Challenges' *Digest of Middle East Studies* Vol. 25 (No 2) (2016) p.217.
[554] *Ibid.* p. 218.

construct this 'ideal' and hold others accountable to it, when varying interpretations of human rights continue to prevail. He draws upon the differences between the Arab Charter for Human Rights (2004),[555] created by the Arab League and the human rights contained in other regional mechanisms, for example the European Convention on Human Rights (1950) to testify these claims. However, common denominators between states do indeed exist, as we have previously mentioned, in the form of the UN Charter (1945) and *jus cogens* norms etc. In the initial groundwork of an IConC, states can be engaged in the dialogue on the basis of these commonalities, permitting an IConC to later balance and examine the more complex intricacies states may have with possibly conflicting rights.

Professor Nasrawin highlights the most fundamental of issues which does indeed require our further attention and creative problem-solving, namely the question of sovereignty. How should we persuade states to surrender a degree of their sovereignty to pursue this collective goal of an IConC? He correctly notes that:

> *'there will be increasing doubts and fears among small countries that this international judicial authority would be greatly controlled and influenced by politically powerful states to impose their views and their own ideas of human rights on the rest of the world.'*[556]

This fear of states, who have historically held greater power on the international stage, dictating the course of international constitutional law is a very real one and has historically tainted much of the work of many international institutions. Allegations of 'western imperialism' and the indoctrination of 'universal' values on

[555] Arab Charter for Human Rights (2004). Available at: http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/1ArabCharteronHumanRights(2004).aspx Last accessed July 2017.

[556] Laith K. Nasrawin, 'An International Constitutional Court: Future Roles and Challenges' *Digest of Middle East Studies* Vol. 25 (No 2) (2016) p.218.

a diverse world are unfortunately commonplace in our international community. If we construct an IConC without confronting this issue then less-powerful states would likely prove to be mere pawns in the great game of superpowers 'westernising' the world, but this time with a constitutional mandate. Indeed, we have seen allegations of this rhetoric at play in many of the cases brought to the ICC- some legal commentators have argued how there appears to be a bias towards focusing on criminal cases concerning African states. With such a backdrop, it seems unlikely that less-powerful states would be willing to submit to the authority of an IConC, if they fear a similar fate. It is my opinion that we have deviated from our mandate on the international stage, on account of superpowers often criticising too-harshly the policies and practices of struggling, developing or transitioning states, whilst holding themselves to an entirely different standard, despite often having greater resources available to them and thus theoretically capable of making better progress. To take but one example, the United States has often found itself preaching to less politically-powerful states on their human rights situations, but how are we capable of reconciling this with the fact that the US is the only UN member state who has failed to ratify the UN Convention on the Rights of the Child (UNCRC) (1989)?[557] For many, this UN treaty is foundational in its mandate and largely beyond dispute in our 21st century world- however, the US's exceptionalism gives rise to a double standard, and with any case of inequality it breeds distrust and a disconnect between peoples and states which produces diplomatic stalemate and ultimately renders international law futile.

[557] United Nations Convention on the Rights of the Child (UNCRC) (1989) Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx Last accessed July 2017. Cited in: 'Why Won't America Ratify the UN Convention on Children's Rights?' (The Economist, 7 October 2013) Available at: http://www.economist.com/blogs/economist-explains/2013/10/economist-explains-2 Last accessed July 2017.

It is evident that the work of international constitutional law is capable of determining and redrawing the parameters of state obligations towards human rights protections. Although the doctrine of consent is a powerful one in international law, the UN Charter (1945) through Article 103, alongside Article 53 of the Vienna Convention on the Law of Treaties (1969), allow for non-derogatory state engagement with constitutional elements of international law.

Professor Nasrawin highlights the arguments of Karen and Helfer in identifying the potential for domestic courts and judges in utilising the rulings of an IConC in their legal reasoning, in order to strengthen their judicial power within a state which grants them limited authority.[558] In stark contrast to this, many states and the judges therein already reject the notion of international law as a higher law and thus would be prone to also rejecting constitutional review decisions by an international body as a logical extension.

> *'In the United States, opponents of international legal authority regularly argue that the national democratic will should trump international legal obligations, that governments should not be able to use international law to circumvent domestic processes, and that national court rulings should be based purely on analysis of domestic laws and the domestic constitution.'*[559]

Far from a competition between international and domestic judges and their legal authority- it should instead be viewed as a convergence and collaborative effort. After all, the proposed IConC would be comprised of judges from the domestic sphere. This 'alliance' is fundamental to the success of the initiative. According to

[558] Karen and Helfer (2010). Cited in: Laith K. Nasrawin, 'An International Constitutional Court: Future Roles and Challenges' *Digest of Middle East Studies* Vol. 25 (No 2) (2016) p.218.

[559] Rabkin (2005). Cited in Laith K. Nasrawin, 'An International Constitutional Court: Future Roles and Challenges' *Digest of Middle East Studies* Vol. 25 (No 2) (2016) pp. 218-219.

Alter, whom Nasrawin cites: 'the support of national constitutional courts can be both necessary and sufficient for the [IConC] to gain constitutional review authority.'[560] It is such efforts to establish 'constitutional obedience' in the domestic sphere which will prove the most burdensome, and thus require the most creative of solutions. If we fail to realise such a collaboration and do indeed create a platform for individual redress at an IConC, the victims of this failure will be the individuals who 'will be located between the hammer of his[/her] national constitutional court and the oak of the [IConC].'[561]

D. Passing the Baton: Realisation

'The end of the presidential term of the Tunisian President Marzouki should not be seen as an abandonment of the idea that he fought furiously to implement in real life- namely an International Constitutional Court to act as an international independent judicial entity – with terms and conditions of enforcing the highest standards of democracy and protection for human rights, which are under real threat of violation by dictatorial political regimes.'[562]

It is necessary to first reiterate my commitment to the foundational premises of the proposed International Constitutional Court of Moncef Marzouki, and I believe that the international community is indebted to him for not only his work

[560] Alter (2001). Cited in Laith K. Nasrawin, 'An International Constitutional Court: Future Roles and Challenges' *Digest of Middle East Studies* Vol. 25 (No 2) (2016) p. 219.
[561] Laith K. Nasrawin, 'An International Constitutional Court: Future Roles and Challenges' *Digest of Middle East Studies* Vol. 25 (No 2) (2016) p. 221.
[562] *Ibid.* p. 222.

advocating for human rights in North Africa and the Arab world, but also in providing such a comprehensive and strong foundation for international constitutional law, upon which others are capable of analysing, scrutinising and strengthening. It is in our collective interest to question the world around us, which by extension also includes such proposals to alter and improve it. It is in this vein that I aim to build-upon the commendable work already achieved by Former President Moncef Marzouki and international lawyers alike in this domain of international constitutional law, even in the most trifling of ways. To anyone who shares a passion for the protection of human rights and the strengthening of international institutions which aid us in doing so, it is clear that progress is often only achieved through identifying legal voids and quandaries, undertaking said struggles, posing questions and solutions, reviewing the solutions of our peers and collectively moving forward.

Thus, let us begin by analysing Moncef Marzouki's conception of the composition of judges of the proposed IConC. Although one is inclined to concur with the legitimacy of the aforementioned proposal for the appointment of IConC judges, I fear the result may be tainted in favour of certain states with judges who have benefited from a certain legal education. At no point in the prior analysis of court composition does it stress the need for diversity in legal education, background etc. If the IConC falls victim to apparent prejudice or tilts in favour of western democracies, many authoritarian states, I fear, may merely ignore or refuse to grant the IConC jurisdiction to adjudicate their case. In this way, it grants such states the capacity to argue that the IConC is a tool of 'western imperialism', and equipped with propaganda in their domestic sphere, the populace therein would also be likely to come to this conclusion, rendering them incapacitated to pursue an individual complaint to the IConC. Furthermore, with such a mechanism of selection, would a

judge who had been educated in an authoritarian state be capable of gaining appointment? Thus, I would instead advocate for a mechanism which would allow for greater diversity in judges, in the interests of democratic legitimacy- perhaps the nomination of one candidate from each UN member state, and then a rota of 21 judges randomly appointed from those candidates with a non-renewable term of 3-5 years.

In addition, the potential in the proposed Court's advisory function should, I assert, not be underestimated- as this is where the initial groundwork and potential for its recognition and respect could derive. Its advisory powers could allow judges to analyse potentially unconstitutional draft legislation prior to its enactment, and offer recommendations to ensure conformity with international standards.

One further issue surfacing from an analysis of Moncef Marzouki's proposition is his identification of certain international human rights treaties, which he argues will provide the legal basis for the court's standard of an 'international constitutional culture'. Though he draws attention to numerous key human rights treaties, and I must caveat that I am unsure of whether this list was intended to be comprehensive or not, but the list does appear to have a regional bias. By refusing to take account of regional understandings of 'constitutional culture' in the contexts of the Middle East and Asia as a whole, we are again potentially leaving the IConC open to allegations of 'western imperialism'. Are we merely joining our regional human rights treaties together into one location? If so, what becomes of Asia who do not have such a human rights mechanism or regional human rights framework? Although the ASEAN system is perhaps a precursor of progress to come in the sphere of human rights protections in Asia, not only is it not included in the 1999 proposal of the IConC, but its mandate is constrained to a very specific area of predominantly South-East Asia. How are we capable of claiming a universalistic

'constitutional culture' if the opinions of people in vast areas of the world are not included in our lens? Furthermore, if we are to construct an IConC on the basis of a regional understanding of a 'constitutional culture', then our endeavours are likely to be destined for failure; we need look no further than the continuous conflicts and balancing between regional understandings of human rights and international standards to identify that the two notions often do not align and are far from capable of converging to form a 'universal' standard.

Although Professor Nasrawin, in recounting the IConC proposal of Moncef Marzouki, has duly noted the need for this institution to hold sufficient power and jurisdiction to render legal decisions which are both respected and enforced, 'it is beyond doubt that constitutional obedience is a culture.'[563] For Nasrawin, there is no need to locate 'constitutional rhetoric' or 'constitutional legal doctrines',[564] in order to advocate for 'an international constitutional review authority'- thus the issue is largely neglected in his analysis. However, I must depart from this reasoning, despite the complications that this gives rise to. Though I am inclined to agree with the existence of a 'constitutional culture of obedience', this is too idealistic for most states and leaves such a vast 'margin of appreciation' to domestic authority that it is capable of rendering any decision of the proposed IConC open to the rebuttal: 'it is not in our culture'. Later, perhaps we can argue that a 'culture' exists, but whilst we live in a world where states are often reluctant to accept an international body preaching a 'culture', we need to serve evidence of the constitutionality of international law, and its sources.

It is the belief in higher norms of universal human rights and freedoms which should be prioritised and protected against the efforts of individuals or political

[563] *Ibid.* p. 217.
[564] *Ibid.* p. 217.

parties whose self-interested agendas of cultivating power-monopolies threaten the very crux of human rights and international law. Therefore, it is the translation of this theoretical 'constitutional culture' into a domain where states respect the jurisdiction and mandate of a proposed IConC, that will prove most problematic, I believe. As some states show signs of retreating into their domestic sphere, how can we reinvigorate engagement with the international community and its institutions? It is necessary, I assert, for any proposed international institution to showcase from where it has derived its power and jurisdiction, and leave no space for potential deviation or rejection of its mandate. To do so, we must not merely argue the existence of a 'constitutional culture' to an international community comprised of a diverse array of cultures. We too often see 'cultural relativism' invoked inappropriately on the world stage to defend unconstitutional state behaviour and actions- we cannot allow it to taint the progress of any more international institutions. States are more receptive to rules, laws and evidenced norms which are capable of withstanding even the most creative of legal interpretation and manipulation- it is with this in mind that we must proceed with the realisation of an IConC.

IV. The International Criminal Court: The Model?

'The court project does not threaten sovereignty but demands that commitments made in full sovereignty be honoured.' [565]

I align myself, alongside Mr Marzouki, in advocating for the creation of an IConC, based loosely on the example of the ICC. Although he constructs his proposal for an International Constitutional Court wholly upon the ICC model, I instead think it is more valuable to critique some of the ways in which the ICC has struggled to live up to its expectations in terms of its implementation. In terms of its purpose, granting of powers and how it was constructed, there are of course lessons to be learnt. However, its implementation has been widely criticised by many leading academics. As a ground-breaking and innovative construction in the recent history of international law, it is understandable why Mr Marzouki would have chosen to naturally draw upon the ICC as a model for his proposed court. But if we are to delve beneath the surface of the ICC, we can in fact identify many areas which require reform and thus we should refrain from merely blindly applying an ICC model in its entirety.

The ICC has proven to be ground-breaking in punishing war criminals for the most serious of international crimes, and not allowing for a legal or physical vacuum wherein criminals can hide. The ICC aims to empower the mandate of striving for international criminal justice and fighting against impunity. It has largely provided a complementary function to domestic courts, instead of attempting to usurp the

[565] Monique Chemillier-Gendreau, 'How to Enforce Guarantees of Freedom: The Court of Democracy' (September 2013, Le Monde Diplomatique). Available at: http://mondediplo.com/2013/09/02democracy Last accessed July 2017.

authority of domestic courts, and in this way, has avoided the sovereignty debate. With a budget of 139.5 million Euros in 2016, the ICC has thus far heard 23 cases before its Court and ICC judges have issued 29 arrest warrants, with 8 persons detained by the ICC, 3 charges have been dropped and 13 persons are yet to be located.[566] Owing to the support of states, however, the ICC has proven highly successful in locating those whom they have issued arrest warrants for, and effective in bringing them to justice.

It has, however, been undermined somewhat by many of the most powerful states in the international community refusing to sign its founding treaty, The Rome Statute (1998).[567] There is also increasing criticism that the focus of the ICC in investigating and prosecuting war criminals has drawn too heavily on African states, and thus a regional bias has come to the fore. As a result, some states are detaching from the ICC and withdrawing their initial consent to jurisdiction through the aforementioned Rome Statute (1998). But on the whole, the ICC has received recognition by more than 120 states who have adopted the aforementioned founding treaty,[568] although the extent of state engagement with the institution has of course varied, the internationalisation of criminal law with a judicial and investigative function shows how the international legal community is capable of ensuring that legal mechanisms remain current and relevant to domestic realities and global problems.

[566] The International Criminal Court. Available at: https://www.icc-cpi.int/about Last accessed July 2017.
[567] The Rome Statute of the International Criminal Court (1998) A/CONF.183/9. Available at: https://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf Last accessed July 2017.
[568] The International Criminal Court. Available at: https://www.icc-cpi.int/about Last accessed July 2017.

A. Lessons in Institution-Building: Establishing an IConC

'The driving force behind international criminal law…is ***faith****- always inspired and often exuberant. Faith was necessary in order to actually establish the juridical institutions.'*[569]

Resulting from the crimes which gripped the international community with shock and disgust in the 20th century, it was arguably inevitable that such a court with an international criminal law mandate would be eventually constructed to prevent future atrocities of that nature and scale. On account of the fact that many violations of international law resulting from that time were left unpunished, the international community responded with conviction. The Nuremburg and Tokyo tribunals were constructed in the aftermath of WW2, coupled with the UN General Assembly accepting the need for a permanent international court for the future. Although these efforts were stalled in their realisation, the end of the Cold War brought further impetus behind such a mechanism. Whilst recognising the inherent need for an eventual permanent international criminal law court, but restrained in terms of its construction, the international community instead consistently created ad hoc criminal law tribunals to confront specific violations of international law. Most recently, this has taken the form of the tribunals for the former Yugoslavia (ICTY, 1993), Rwanda (ICTR, 1994), alongside the Special Court for Sierra Leone (SCSL, 2002) and the Extraordinary Chambers in the Courts of Cambodia (ECCC, 2003).

[569] Mark Drumbl, 'International Criminal Law: Taking Stock of a Busy Decade', *Melbourne Journal of International Law* (2009) Vol. 10. Available at: http://law.unimelb.edu.au/__data/assets/pdf_file/0011/1686062/Drumbl.pdf Last accessed July 2017.

In 1998, a conference in Rome took place to formally create such a permanent institution, through the Rome Statute (1998). To distinguish between the former ad hoc tribunals and this permanent court, the ICC has a broad mandate and jurisdiction, whereas the ad hoc tribunals have a limited and specific mandate, and thus this limits their jurisdiction. In terms of jurisdiction and legal standing, therefore, the ICC is at the forefront of international legal developments. If we compare the ICC to the ICJ, for example, the former is able to try and convict individuals, whereas the ICJ is confined to settling inter-state complaints. Although there is of course still demand for inter-state complaints, the effect of initiating a complaint against another state has such a high diplomatic and political cost, that for the most-part states will refrain from using this mechanism, and it has been rendered arguably futile.

One of the ways in which the ICC has proven ground-breaking in its construction is in terms of the jurisdiction which it holds. The jurisdiction of the ICC lay in its complementarity to domestic courts, who prove unwilling, unable or simply do not prosecute criminals.

'This might occur where proceedings are unduly delayed or are intended to shield individuals from their criminal responsibility.'[570]

As such, priority in jurisdiction always starts with the domestic context, and if it proves unwilling or simply does not act, then the international mechanisms step in (Article 17(1) Rome Statute (1998)). In this way, sovereignty remains intact. This innovative complementary jurisdiction has allowed the ICC to largely avoid the sovereignty arguments which international institutions often face. Upon ratifying the Rome Statute (1998), states have agreed to the jurisdiction of the ICC. From that

[570] 'Understanding the International Criminal Court' Available at: https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf Last accessed July 2017.

point onwards, any alleged perpetrator of international criminal law who is a national of a state party or who commits a crime in the territory of a state party, can be brought before the ICC for investigation and potential prosecution. In this way, the jurisdiction of the ICC is deeply woven into the very fabric of the states, and thus many states do not believe there to be a conflict between state sovereignty and the pursuit of international criminal justice. There are, of course, some states who continue to view the ICC and its mandate as a potential threat to state sovereignty, for example the United States.[571]

The United Nations Security Council also has the power to refer a case to its remit, in line with Chapter VII of the United Nations Charter (1945),[572] as do states- both of which grant the ICC the power to investigate whether a war crime took place before adjudicating on the matter. Thus, it serves both a fact-finding and judicial function- which could be mirrored by the proposed IConC.

Some commentators have noted that the ICC has progressed slowly and has failed to prosecute war criminals with sufficient speed, considering how costly the mechanism is. However,

'if we judge it by its deterrent effect, then we just need to be reasonably convinced that it's actually changing the behaviour of tyrants and ilk around the world, and I think there is some evidence of that.'[573]

The powerful deterrent function of the ICC is capable of being transposed into the field of international constitutional law, through identifying states which are failing

[571] Thomas Thompson-Flores, 'The International Criminal Court: Will it Succeed or Fail? Determinative Factors and Case Study on this Question' *Loyola University Chicago International Law Review* (Vol. 8(1), 2010) p. 57.
[572] The United Nations Charter (1945), Chapter VII.
[573] Fadi El Abdallah, Professor William Schabas, 'Interview: Pros and Cons of the ICC' (30 June 2012) Available at: http://www.dw.com/en/interview-pros-and-cons-of-the-icc/a-16063112 Last accessed July 2017.

to uphold the rule of law and human rights protections, and have largely been rendered illegitimate by their exceptionalism. This soft tool of legitimacy is strong against the international community.

Thus, we are forced to posit the question of why states have consented to the jurisdiction of the ICC, despite the widely-held belief that states are increasingly shielding themselves from outside intervention and the loss of any additional sovereignty, beyond what they have already consented to. It seems to me that perhaps states ratified the Rome Statute (1998) of the ICC, because it was largely in their interests to do so. Fundamentally, the structure of the ICC itself, as we have just seen, does not threaten the sovereignty of states, it is complementary in nature. The common denominator in the states which have not merely consented to the jurisdiction of the ICC, but have complied with its mechanisms and actively supported its work, despite it targeting their state and its war criminals, are either transitioning states or developing states, who arguably engaged with the mechanism to perform and showcase their legitimacy to the international community.

Perhaps, for numerous states, emerging from authoritarianism, development or transitioning, the ICC provided a chance through which they could legitimise their state and show the progress they had made to the wider world, in order to incentivise further investment, aid etc. The ICC, therefore, offered a way into the international legal sphere, an opportunity to legitimise their state, and with legitimacy comes power. This legitimising pursuit predominantly allows for greater foreign-investment in their domestic sphere. As ever, investment and money are often the driving force to incentivise states.

With regard to allegations of the costliness of the ICC, considering the small number of convictions, it is necessary I believe to make a cost comparison between itself and other UN mechanisms, bearing in mind whether the institution itself has a

preventative or reactionary mandate. The ICC annual budget for 2016 was €153 million,[574] bearing in mind that that the mandate is a wholly reactionary one of investigating alleged crimes. Although on the surface this may appear costly, the UN peacekeeping budget between July 2016 and June 2017 stood at US$7.87 billion;[575] importantly, this also has a largely reactionary function. The ICC budget does not seem so vast when contextualised with other reactionary international institutions. I assert, however, that if we were to invest in preventative institutions, this would reduce the costliness of these reactionary institutions. Arguably UN peacekeeping costs would be lower if we could prevent states from descending into conflict and political crises in the first place. We should focus on empowering and funding projects and initiatives which prevent this descent into crisis, at which point the UN institutions are forced to pump vast amounts of money into restoring normalcy and order. Although this appears to be a logical deduction, it is surprising to find that actually preventative, fact-finding and investigatory missions are hugely under-funded in comparison to their reactionary counterparts. For example, the annual budget between 2016 and 2017 for the Office of the High Commissioner for Human Rights (OHCHR) amounted to US$ 190.5 million. [576] In 2004, the budget for the Special Procedures mechanisms of the OHCHR amounted to a mere US$1.5

[574] Niklas Jakobsson, 'The 2016 ICC Budget – More Money, More Problems?' (Justice Hub, 17 September 2015) Available at: https://justicehub.org/article/2016-icc-budget-more-money-more-problems Last accessed July 2017.

[575] United Nations Peacekeeping, 'Peacekeeping Fact Sheet' (31 May 2017) Available at: http://www.un.org/en/peacekeeping/resources/statistics/factsheet.shtml Last accessed July 2017.

[576] United Nations Human Rights: Office of the High Commissioner, 'OHCHR'S Funding and Budget' Available at: http://www.ohchr.org/EN/AboutUs/Pages/FundingBudget.aspx Last accessed July 2017.

million. [577] In this way, many of the preventative international mechanisms are hugely underfunded and unsupported, and rely on voluntary contributions.

Therefore, when we look at the cost of domestic crises not only in terms of the effect on human rights protections, the long-term effects of instability and exceptionalism, alongside the financial costs, it seems logical that the international legal community needs to place greater emphasis on preventing such crises from becoming fully-fledged in the first place. This preventative function would be fulfilled by an IConC in advising and investigating complaints of illegitimate elections, unconstitutional actions and denouncing constitutions which do not comply with international constitutional standards, prior to materialising into total exceptionalism and authoritarianism, which will later prove to be an even greater burden to the international community both politically and financially.

Even aside from this cost analysis of the ICC, you cannot put a price on the deterrent effect it surely showcases to the international community, and has '[served] an important expressive and jurisprudential function'. [578] However, this is of course difficult to reconcile with the reality that the average cost per conviction at the Rwanda Tribunal (ICTR) stood at approximately US$30 million, and yet in Rwanda the average cost of living is less than US$2 a day.[579] This balancing of various costs is a daily difficulty for the international community, but I assert that generally

[577] Oliver Hoehne, 'Special Procedures and the New Human Rights Council- A Need for Strategic Positioning' *Essex Human Rights Review* (February 2007, Vol 4(1)) Available at: http://projects.essex.ac.uk/ehrr/V4N1/Hoehne.pdf Last accessed July 2017.
[578] Mark Drumbl, 'International Criminal Law: Taking Stock of a Busy Decade', *Melbourne Journal of International Law* (2009) Vol. 10. Available at: http://law.unimelb.edu.au/__data/assets/pdf_file/0011/1686062/Drumbl.pdf Last accessed July 2017.
[579] World Bank, 'World Development Indicators 2005: Table 2.5 (Poverty) (2005). Cited in *Ibid.*

speaking, there should be greater funding and resources granted to preventative initiatives.

Furthermore, as a result of complementary jurisdiction used by the ICC, this has allowed for greater engagement with and participation of the domestic civil society in enforcing international criminal law.

> *'International criminal law now reaches deep into national jurisdictions. Over the past decade, national courts have increasingly prosecuted and punished perpetrators of genocide, war crimes and crimes against humanity. In Rwanda alone, at least 10,000 individuals have come before national courts, and may hundreds of thousand- perhaps up to 1 million- more have appeared in neo-traditional gacaca proceedings.'*[580]

It would be fundamental to the success of an international constitutional venture to engage civil society in this dialogue in much the same way.

B. Critiquing the Implementation of the ICC: A Doomed Model?

Although the ICC's construction as an institution on the international level is widely considered to be a great success of international lawyers, widespread criticisms have surfaced in terms of how the ICC has implemented its powers in reality.

[580] *Ibid.*

It provides an interesting insight into the inner-workings of international legal mechanisms if we question why some states decided to cooperate with its mandate, and others have chosen to disassociate themselves from it altogether. An even-more thought-provoking question is:

'*What are we to make of the fact that in its 11-year history, the International Criminal Court has prosecuted only Africans?* '[581]

Is this to be viewed as the ICC discriminatively targeting African states and African war criminals, or is this instead numerous states, who just so happen to be in Africa, pushing themselves to the forefront? The defence against allegations of bias from the ICC, take the form of:

'*The ICC is hardly an institution that looks anti-African. Its largest block of members 34 of its 122 states- are from Africa, and they were central in negotiating the Rome Treaty that established the court.* '[582]

However, by targeting certain states in their initial work, the ICC has carved out a reputation amongst many legal commentators and the international community as a whole for having a certain bias against African states. Although targeting states, during its initial implementation, who wish to prove their legitimacy on the international stage may indeed be advantageous to all parties- the point at which this turns to a regional bias becomes a dangerous balancing act to avoid at all costs if mirrored by an IConC.

In addition to this, as previously mentioned, the ICC has been accused of being too costly and requiring too much manpower in order to function effectively. As such,

[581] Kenneth Roth, 'Africa Attacks the International Criminal Court' (Human Rights Watch, 14 January 2014) Available at: https://www.hrw.org/news/2014/01/14/africa-attacks-international-criminal-court Last accessed July 2017.
[582] *Ibid.*

the ICC has limited the scope of cases it is willing to accept, limiting its jurisdiction to cases with 'sufficient gravity', in order to ensure that the primary responsibility lay with individual states to try their own cases. This high threshold and the gaps which it creates in the enforcement of international criminal law, ultimately limits the effectiveness of the ICC.

Numerous legal commentators have also criticised the ICC for how it has managed the interplay between peace and justice, in line with Article 16 of the Rome Statute (1998) which is capable of suspending prosecutions at the request of the UN Security Council. Although peace and justice are often considered to go hand in hand, at times they are in fact at logger-heads with one another:

> *'ICC investigations and prosecutions will actually harm local populations in conflict territories. By prosecuting militia leaders or central political figures that are actively engaged in ongoing conflicts, the Court's actions can drive a wedge into peace negotiations. The tension between peace and justice during reconciliation talks is most apparent when militia leaders and government heads claim that they will not agree to any peace settlement until they are granted impunity from ICC prosecution.'*[583]

Although this is a difficult balancing act between achieving justice for victims, and jeopardising peace for the masses, this could arguably be aided by an IConC in overseeing transitioning states, ensuring legitimate elections take place and constitutional documents are in line with international standards. Although the ICC may not be empowered to ensure peace-processes and transitions run smoothly, this is most certainly a void that an IConC is capable of bridging.

[583] Thomas Thompson-Flores, 'The International Criminal Court: Will it Succeed or Fail? Determinative Factors and Case Study on this Question' *Loyola University Chicago International Law Review* (Vol. 8(1), 2010) p. 74.

C. Alternative Models: Food for Thought

Faced with the limitations of the existing mechanisms of international law which are proving largely ill-equipped in protecting human rights, some legal scholars have advocated for a World Court of Human Rights in recent years to address many of the issues which I have identified in this paper.[584] The age-old criticism that human rights discourse is mere rhetoric until they are enforceable has catalysed newfound creativity in the sphere of international law. Human Rights have, in recent decades, become increasingly judicialized. There is increasing recognition and acceptance that in our vitriolic world of increasingly authoritarian and exceptional states, there is a greater need to advocate for a stronger and more enforceable body of international human rights law with urgency. As we have seen in our discussions, we must allow for no legal void to exist- if such gaps exist then this is where the 'homo sacer' will fall victim. We must look to innovative ways of constructing a mechanism which combats these common issues.

Following the 1993 Vienna World Conference on Human Rights, the government of Switzerland advocated for an 'Agenda for Human Rights', and at the forefront of these discussions was a proposed World Court of Human Rights. [585] Such efforts have culminated in the drafting of statutes for the proposed institution in 2009, highlighting potential practical issues and offering pragmatic solutions. Such proposals, alongside the draft statutes, have been theoretically advanced by Manfred

[584] Gerd Oberleitner, 'Towards an International Court of Human Rights', in Mashood, Baderin and Manisuli Ssenyonjo (eds.) *International Human Rights Law: Six Decades after the UDHR and Beyond* (Surrey, England, Ashgate Publishing, 2010) pp. 359-370.
[585] Martin Scheinin, 'Towards a World Court of Human Rights', Swiss Initiative to Commemorate the 60th Anniversary of the UDHR (June 2009). Available at: http://www.enlazandoalternativas.org/IMG/pdf/hrCourt_scheinin0609.pdf Last accessed July 2017.

Nowak, Julia Kozma and Martin Scheinin, aided further by the International Commission of Jurists. [586]

In the initial groundwork completed to advocate for a World Court of Human Rights, Scheinin identifies one of the main hurdles facing our existing body of international human rights law- namely constraining human rights obligations to states exclusively as the duty-bearers. Scheinin explains:

'The exclusive focus of human rights treaties and their monitoring mechanisms [is] states as the duty-bearers. This no longer corresponds to the realities of our globalized world where other actors besides states, such an international financial institutions and other intergovernmental organisations, transnational corporations and other non-state actors enjoy increasing power that affect the lives of individuals irrespective of national borders, and therefore possess also the capacity to affect or even deny the enjoyment of human rights by people.' [587]

The extension of legal personality, to fully protect human rights across all potential violators and in the name of all potential victims, would be an important aspect of any proposed new institution to advance greater human rights protections. The draft statutes of the World Court of Human Rights were constructed on the basis of the Rome Statute of the ICC, elevating this legal drafting as highly skilful and negotiating difficult terrain in international law- our proposed IConC has been advanced on much the same basis.

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[586] International Commission of Jurists, 'Towards a World Court of Human Rights: Questions and Answers' (Supporting Paper to the 2011 Report of the Panel on Human Dignity, December 2011) Available at: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/07/World-court-final-23.12-pdf1.pdf Last accessed July 2017.

[587] Martin Scheinin, 'Towards a World Court of Human Rights', Swiss Initiative to Commemorate the 60th Anniversary of the UDHR (June 2009). Available at: http://www.enlazandoalternativas.org/IMG/pdf/hrCourt_scheinin0609.pdf Last accessed July 2017 p.8.

One further lesson we can draw upon from this proposed model, and use as a driving force behind our proposal, can be seen in arguments made by Scheinin to explain why states would indeed consent to the jurisdiction of such a court. Although many legal scholars might assert that such efforts are unrealistic, too idealistic and impractical to the demands and power-complexities of our 21st century world, he offers four reasons to explain why states would engage with such a mechanism:

'Firstly, many states wish to demonstrate their unwavering commitment to human rights.'

'Secondly, many states wish to see more consistency in the application of human rights law. Bringing all UN human rights treaties within the jurisdiction of a single human rights court that will simultaneously apply all treaties accepted by the state in question.'

'Thirdly, this will improve foreseeability and legal certainty.'

'Fourthly, states should welcome the initiative of expanding the binding force of human rights norms beyond states only, to cover also international organisations, transnational corporations and other entities subject to the jurisdiction of the court.'[588]

Prior initiatives also took the form of a proposed International Court of Human Rights in the 1940's, but ultimately it lost majority-support and lacked the driving force from states to push the efforts forward. It is my view that many of the issues we are currently witnessing in our 21st century globalised world have an inherently constitutional nature; we are in the midst of a world in a 'constitutional crisis'. It is with this backdrop that we must confront human rights issues. Alongside this,

[588] *Ibid.* p. 25.

having proven that our existing international legal structures have already carved out for themselves a constitutional mandate, and having identified constitutional documents and norms which we could easily utilise, on account of their widespread recognition and acceptance by the international community, it certainly seems as though an International Constitutional Court would be well-placed to fill the legal void which myself and legal scholars have likewise identified. What remains clear is that an institution is urgently required in order to piece together the gaps which we can identify in our body of existing international human rights law.

V. Refining the Model: Initial Steps

As we can witness from the case of the ICC, the institution we see before us today, complete with all of its vices and virtues, was not born overnight. Ad hoc tribunals came before it, as did a vast amount of research and work undertaken by the International Law Commission (ILC):

'to study the desirability and possibility of establishing an international judicial organ to prosecute individuals charged with genocide.'[589]

In fact, the ILC had drafted a statute for an ICC as early as 1951, with a revised version in 1953, but the UN General Assembly stalled in passing it.[590] Resultantly,

[589] William Driscoll (ed.) *The International Criminal Court: Global Politics and the Quest for Justice* (2004) p.24. Cited in: Thomas Thompson-Flores, 'The International Criminal Court: Will it Succeed or Fail? Determinative Factors and Case Study on this Question' *Loyola University Chicago International Law Review* (Vol. 8(1), 2010) p. 60.

[590] Thomas Thompson-Flores, 'The International Criminal Court: Will it Succeed or Fail? Determinative Factors and Case Study on this Question' *Loyola University Chicago International Law Review* (Vol. 8(1), 2010) p. 60.

it took 40 years before a judicial organ with a permanent mandate was actually formally established. Although the international community erred on the side of caution with regard to the establishment of an ICC, it seems that, when we consider that international constitutional law largely already exists in the form of the UN Charter (1945) and *jus cogens*, transposing this from theory to a legal reality does not pose such a great threat as the proposed ICC did back in the 1950's.

We saw persistent international criminal legal issues being addressed through temporary *ad hoc* tribunals, without truly going to the root of the problem for a long time. We should refrain from making the same mistake in the ambit of international constitutional law. Instead of settling for temporary solutions, we should instead be proactive in reforming the international legal mechanisms to reflect the needs and realities of states and contemporary global issues, namely a proliferation of domestic examples of 'constitutional crises'.

In much the same way as the ICC's construction was stalled and pacified through *ad hoc* mechanisms, a proposed IConC has proven to be on the radar of the international community for quite some time, but the issues found in 'constitutional crises' have been dealt with by specific and largely limited-mandate institutions. For example, with the vast number of illegitimate elections taking place across the world, which in turn has impacted on the continuation and/or rise of authoritarian powers and a general deviation from human rights protections, instead of using this as further evidence for the need for a formalised IConC, the international reaction has been timid in instead codifying an unenforceable UN Declaration of Principles for International Election Observance and Code of Conduct for Election Observers (2005). We can draw similar parallels in the way in which the 'War on Terror' has been managed by the international community- instead of proactively sourcing and

attacking the root of the issue, specific measures are taken which fail to grasp at any substantial progress, largely due to lacking enforceability.

As a result, in the international constitutional sphere we have been left with insufficient tools to adequately grapple with domestic 'constitutional crises'- a dense body of existing international legal mechanisms which collectively fail to confront the crux of the issue, individually-mandated and yet with no formalised common ground or links between them to strengthen the system as a whole, despite clear theoretical commonalities. Resultantly, a void has emerged between the existing legal mechanisms which sporadically confront constitutional crises and the reality of the substantial issue at hand. An IConC could potentially bridge the void between the existing mechanisms and structures, and the domestic reality, in a way which ensures full accountability and participation. The model upon which these existing mechanisms have been built, fails to take into account the dualism between the exception and the norm, and said mechanisms have attempted to place the exception within the norm.

Through the construction of an IConC we would be capable of firmly disassociating the exception from the norm, by placing the exception within the jurisdiction of an IConC. Distinguishing between the norm and exception, through a dualist model, would be fundamental to paving the way for progress with regard to widespread evidence of constitutional crises.

In order to move this proposal forward, however, we must be capable of not merely locating international constitutional legal doctrine, but also deciphering a method of implementation and an appropriate understanding of jurisdiction which will not compromise or be seen to threaten the sovereignty of states. Regarding the former, we have located evidence of a constitutional document, in the form of the UN Charter (1945) and *jus cogens* norms. Furthermore, we have seen that if we utilise

the UN Charter (1945) as the basis of our international 'constitutional culture' then, owing to the fact that states have already consented to its contents, we are sure to jump over the sovereignty hurdle and allow for jurisdiction to pass. In light of the fact that 120 states have granted complementary jurisdiction to the ICC, it seems likely that many states would be likely to do so also for the sphere of international constitutional law. On a similar basis, a mechanism of complementarity could be established for the proposed IConC, wherein domestic constitutional courts would act as the court of first instance for alleged violations of international constitutional law, but where states did not do so, or were unwilling to do so, or indeed a domestic constitutional court did not exist, an IConC would intervene. Predominantly, the IConC would serve an advisory and investigatory function, carrying out much of the work that Special Rapporteurs have carried out in previous years, but with a limited mandate.

Fundamentally, if we were to transfer complementary jurisdiction from the ICC to an IConC, we would need to address one of the issues we have seen prevail with regard to domestic implementing legislation of the ICC- namely domestic legislation not mirroring that of international criminal law, and therefore the court of first instance (so to speak) in the domestic sphere often cannot try an alleged perpetrator because there is no domestic legislation upon which the case can be brought.

Pivotally, there needs to be a convergence between international constitutional law and domestic constitutional law, in order for complementarity to work effectively. This lack of convergence has placed a greater burden on the ICC, as many domestic courts are simply unable to try cases, because they do not have the legislation with which to do so. In this way, the proposed IConC would require states to ensure that their constitutional documents were in line with international constitutional law,

aided by the advisory and investigatory functions of the IConC. This would avoid the inherent issues we have located in the implementation of complementary jurisdiction with the ICC, and spread the burden of caseload across states and the IConC.

As we have demonstrated in our analysis, international constitutional law has long-played a role in the international legal community, despite no formal label being attached to it. The lack of a formal label, does not, however prevent an international constitution from being treated and accepted as such. We merely must take the necessary steps to ensure that the international legal structures adequately reflect not merely the needs and issues of states, but also that the formal reality corresponds to the theoretical.

To truly confront 'constitutional retrogression', we must not be apathetic in our pursuits, and we must not make piecemeal and fragmented progress, which will ultimately hinder the long-term goal. We must choose institutional fearlessness and build bridges where we can identify gaps, in order to truly emancipate the '*homo sacer*' of authoritarian regimes.

If we are able to concentrate on implementing the key tenets of the UN Charter (1945), as our first initial steps in recognising international constitutional law, this would provide the necessary foundational protective mechanism which would strengthen all existing structures of international human rights law and prevent the possibility of future deviation from individuals and political parties who seek power and influence above the pursuit of justice and human rights protections.

Chapter 8: Emancipating a Twofold 'Homo Sacer': Concluding Remarks

'Keeping proportion. Adhering to the ways of democracy. Upholding constitutionalism and the rule of law. Even under assault and even for the feared and hated, defending the legal rights of suspects. These are the ways to maintain the support and confidence of the people over the long haul. Judges should not forget these lessons.'[591]

To conclude, let me begin by first drawing upon some general undercurrents we can decipher in how we can better understand the predicament of the 21st century '*homo sacer'*. I assert that the '*homo sacer'* is capable of taking two forms, one with regard to outcaste individuals within a state during periods of exceptionalism, and the other, outcaste states within the international community. In the same way that the former requires legitimising by the state, to translate them to 'qualified life', so too must the international community 'qualify' the lives of states. Having discussed this, I will in turn map the logic and flow of this paper, to once more reiterate how we have linked our evidenced examples of constitutional crises, our classification of such as 'constitutional retrogression' and proposed an

[591] Michael Kirby, 'Terrorism: The International Response of the Courts (The Institute for Advanced Study Branigin Lecture) *Indiana Journal of Global Legal Studies* (Winter 2005) Vol. 12(1) p. 321. Available at: http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1299&context=ijgls Last accessed July 2017.

international constitutional solution, having carefully analysed and examined possible alternatives in the existing international legal mechanisms.

Firstly, some general observations on the nature of states and their fear of being branded the '*homo sacer*' of the international community, and how this is capable of being used as a tool to incentivise states to legitimise themselves on the international stage through a constitutionally-mandated mechanism. We can identify a similar approach successfully taken by the ICC in legitimising transitioning or developing states- the soft tool of legitimacy is indeed a powerful one. In an increasingly globalised, interconnected and interdependent world, many states find themselves competing for everything- all striving to be the superpower of the future, entrusted with influencing and tailoring international political, economic, security and legal agendas. However, before states can enter this race, they must be recognised by their state counterparts and thus their legitimacy comes under review. In this way, states obtain their legitimacy though gauging opinions of themselves from other states. Thus, their ultimate fate rests largely in the hands of others. Most states strive to take a more prominent role on the global stage, desiring to reap the benefits and rewards commonly-associated with globalisation, namely- foreign investment, wealth, economic aid and political and military alliances etc. At the crux of inter-state relations are the foundational prerequisites of trust, confidence and consistency. States wish to know that their investments are sound and protected, they need to have faith that their aid is not funding authoritarianism, which in turn gives them bad publicity and standing. Thus, it appears that being the '*homo sacer'* of the international community is arguably not a wise choice for states if they ever hope to engage in, and reap the significant benefits of, inter-state relations.

What states lack in being constrained to the life of *'homo sacer'* is legitimacy, their 'life' has not been 'qualified' by Agamben's 'politic'. Such 'hermit' states are

recognised formally perhaps, but lack sufficient legitimacy for other states to interact with them diplomatically, economically, politically etc. In this way, states can no longer operate in a vacuum.

Thus, in creating an institution, namely an International Constitutional Court (IConC), with the primary purpose of stripping back states to their *'bare life'* and making determinations of their legitimacy through analysing their rule of law, elections and democratic processes, their constitutional structures and protections and thus their protections of human rights and compliance with key international human rights treaties, we can render such states into two categories. By labelling those who fail to prove their legitimacy into the remit of '*homo sacer',* we indirectly empower the citizens therein to protest and strive for normalcy within their domestic domain, in order to prevent them from living on the margins of international society. For states rendered 'illegitimate', it would serve to mobilise the civil society therein. If coupled with recommendations, and guidelines for improvement, the IConC could offer illegitimate states the support they need in order to concretise a more stable democratic structure, a respect for the rule of law, and thus greater protections for human rights and compliance with international law. Those states who conform to international standards of human rights protections, and uphold constitutional protections and the rule of law in their domestic setting would prove to be role-models for other states to learn from- ultimately, creating an interactive dialogue between states to aid a gradual convergence towards a culture of international constitutional law. For most democratic states who already advance human rights protections with a strong rule of law foundation, this determination of legitimacy will prove a relatively simple one, merely a 'formal seal'. Initially, however, the proposed IConC should follow the example shown by the ICC in

targeting transitioning and developing states, who are keen to prove their legitimacy, but refrain from crossing the line into an alleged regional bias.

In so doing, we are capable of not only emancipating the '*homo sacer'* states of the international community, the states who sit at the margins, but also emancipate the '*homo sacer'* within said states. Thus, serving a dual emancipatory function.

From the outset, in Chapter 1, we began with the proclamation of a multi-faceted and deeply-entrenched crisis, exceptionalism, which is increasingly grasping at the foundational tenets and essence of democracy and the protection of human rights. We vocalised our disappointment in the existing legal institutions which have failed to adequately counter the betrayal of human rights, in favour of authoritarianism and their exceptional mandate- quashing all that lay in their path and rendering them the '*homo sacer'*. However, we stood firm in our commitment that apathy and acceptance of the usurpation of the norm by the exception is not the answer; creative and optimistic solutions must be sought to ensure that international law remains relevant and respected by the international community. The increase we can decipher in authoritarian power cannot merely be categorised as a natural ebb and flow in human progress- we must not settle for the depths of the troughs we have witnessed through history, we must choose proactivity and fearlessness. Our proposed solution, the missing piece of the puzzle- the need to constitutionalise international law.

Chapter 2 served as a reminder of what exactly was at stake, drawing upon the example of the descent of Weimar Germany into the Nazi regime after 1933. It laid down how we should understand and measure 'constitutional crises', the distinction between normalcy and exceptionalism, and the ultimate price of being rendered the *'homo sacer'* of a state and the implications of such on human rights protections. Ultimately if WW2 taught us nothing else, it clearly demonstrated our need to

elevate humanity and universal human rights above domestic law and sovereignty: international law shall not be confined to a transient, 'spell-like' state.

We then tailored our understanding and categorisation of domestic 'constitutional crises' to two possible situations- (Category 1) 'States of Exception' & (Category 3) 'struggles for power beyond the boundaries of ordinary politics', and proceeded in Chapters 3 and 4 with evidencing the multiplicity and pervasive nature of exceptionalism in the domestic sphere and the effect this has had on human rights protections and the general departure away from respecting constitutional law when confronted with substantiated, although it is often unsubstantiated, threats to a state, or threats to state power. Regarding Category 1 crises, we examined exceptionalism in the wake of 09/11 in the United States, Australia and France and then analysed how the international legal community attempted to confront the 'War on Terror' within its existing mechanisms, and ultimately failed to protect the '*homo sacer*'. We then turned to evidence Category 3 crises, drawing on the positives of 'people power' in confronting unconstitutional executive power and resuming a state of normalcy, as can be seen with Iceland, The Republic of Korea and The Republic of Tunisia. However, where illegitimate elections take place, often plagued by corruption and secrecy, highlighted in the examples of Haiti and the Russian Federation, authoritarianism and exceptionalism become a vicious and perpetual cycle.

Therefore, having testified a world of increasingly-pervasive domestic 'constitutional crises', in Chapter 5 we mapped the commonalities, and ultimately deciphered that this 'democratic decay' can be attributed to 'constitutional retrogression' by states, as opposed to the common misconception that states are witnessing 'authoritarian reversion'. Resultantly, our proposed solution to this constitutional predicament should similarly take a constitutional form. We should

focus on strengthening the predicates of democracy, namely: legitimate elections, protecting freedoms of speech and association and advancing the administrative and adjudicative rule of law. Moving forwards, our proposed constitutional solution would need to prove both preventative in regard to confronting 'constitutional retrogression' and also reactionary in combating 'authoritarian reversion'.

We must respond to the warning-signs, no matter how robust the constitutional law or constitutional design of states may appear on the surface; in a post-09/11 world tainted by ambiguities, facades, fear and propaganda we are no longer able to stand at the side-lines and wait for states to digress off the path to such irreparable extents that it compromises the very fabric of international law and existing legal mechanisms.

Pivotally, during exceptional times, we must construct exceptional mechanisms and not rely on our existing international legal mechanisms which provide for conditions and standards to be implemented during periods of normalcy. These institutions and mechanisms are strong, carefully-crafted and have largely proven effective in advancing their goals- but it is vital to remember that their goals largely sit outside of exceptional circumstances. As we have demonstrated in our discussion in Chapter 6, how effective have these institutions proven when faced with the new threats posed by exceptionalism and authoritarianism? We must distinguish in our international legal system between exceptionalism and normalcy through constructing a dualist system of human rights protection, mirroring the same dualism we can see in the domestic legal sphere. We can no longer allow the exception to dilute the universalism and enforceability of the norm. Furthermore, we must build an institution which serves as a foundation to string together the mandate of all previous mechanisms, strengthening the system as a whole and preventing future deviation from human rights protections.

This paper has been an attempt to build on the foundations set by Mr Marzouki, outlined in Chapter 7, in establishing the next phase and direction of international human rights law- namely, a focus on legitimacy, and cultivating mechanisms which are capable of responding to exceptionalism and the challenges it brings through the construction of an International Constitutional Court, centred upon the UN Charter (1945) as its foundational constitutional legal document. Having considered the lessons that can be taken from the initial establishment and performance of existing institutions, and taken into account the observations and thoughts of a wide cross-section of legal and constitutional commentators, we have crafted a set of guiding principles and the overarching direction of, an International Constitutional Court.

I have sought to evidence the inevitably complex challenges of such an implementation, along with the shortcomings of the international community's previous endeavours in the fields of both criminal and human rights law. In building on the foundation this provides, we would be better-equipped to not only furnish the operating theatre with the appropriate equipment for periods where exceptionalism takes hold of states, but also to put in place preventative measures to uncover symptoms before they materialise and worsen the condition of the core body, whilst upholding our post-WW2 constructs of model standards and norms for maintaining the 'healthiest' states we can. It is only in such a way, aided by an International Constitutional Court, that we can truly entrench the widest possible protection of human rights and constitutional law, during both periods of normalcy and exceptionalism, leaving no legal or political vacuum for exceptionalism within normalcy.

The game of authoritarianism and exceptionalism is a dangerous one, one which is capable of crippling and disfiguring all that we hold to be true and just- in the words of former US President, Barack Obama:

'We lose ourselves when we compromise the very ideals that we fight to defend. And we honour those ideals by upholding them not just when it is easy, but when it is hard.'[592]

[592] Barack Obama, 'Nobel Lecture: A Just and Lasting Peace' (Oslo, 10 December 2009) Available at: https://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html Last accessed July 2017.

Bibliography

I. Books/Chapters

Agamben, G. *Homo Sacer: Sovereign Power and Bare Life* (Meridian, 1998)

Agamben, G. 'A Brief History of the State of Exception: An Excerpt from *State of Exception'* (2005)

Agamben, G. *State of Exception* (2005, University of Chicago Press)

Agamben, G. *Homo Sacer: Sovereign Power and Bare Life* (Translated by D. Heller-Roazen, Stanford University Press, California, 1998)

Canivet, G. 'Trans-Judicial Dialogue in a Global World' in S. Muller, S. Richards, (ed.) *Highest Courts and Globalisation* (The Hague, Hague Academic Press, 2010)

Cohen, J. *Globalisation and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism* (Cambridge University Press, Cambridge, 2012)

Dobner, P., Loughlin, M. (ed.) *The Twilight of Constitutionalism?* (Oxford University Press, Oxford, 2010)

Driscoll, W. (ed.) *The International Criminal Court: Global Politics and the Quest for Justice* (2004)

Fassbender, B. ‘The Meaning of International Constitutional Law’ in Ronald St. John Macdonald and Douglas M. Johnston (ed.) in *Towards World Constitutionalism* (Martinus Nijhoff Publishers, 2005)

Ferrajoli, L. ‘Beyond Sovereignty and Citizenship: A Global Constitutionalism’ in Richard Bellamy (ed.) *Constitutionalism, Democracy and Sovereignty: American and European Perspectives* (Aldershot, 1997)

Foucault, M. *Security, Territory, Population: Lectures at the College de France 1977-1978* (Palgrave Macmillan, 2009)

Gilbert, G. *Nuremberg Diary* (New York: Farrar, Strauss, 1947)

Ginsburg, T. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, Cambridge, 2003)

Goodale, M., Engle Merry, S. (ed.) *The Practice of Human Rights: Tracking Law Between the Global and the Local* (Cambridge University Press, Cambridge, 2007)

Grant, A. *Originals: How Non-Conformists Move the World* (Viking Publishing, 2016)

Hagmann, T., Reyntjens, F. (eds.) *Aid and Authoritarianism in Africa: Development without Democracy* (Zed Books, 2016)

Irons, P. *Justice at War: The Story of the Japanese-American Internment Cases* (Oxford University Press, 1983)

Klabbers, J., Ulfstein, G. *The Constitutionalization of International Law* (Oxford University Press, Oxford, 2011)

Lichtblau, E. *Bush's Law: The Remaking of American Justice* (Knopf Doubleday Publishing Group, 2009)

Lincoln, A. *Speeches and Writings 1859-1865* (Library of America, 1989)

Lynch, A., McGarrity, N., and Williams, G. (eds.) *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010)

Machiavelli, N. *Discourses on Livy* ch.34 (John Roland ed. Henry Neville Trans. 1675) (1517) (In English)

Maduro, M. 'From Constitutions to Constitutionalism: A Constitutional Approach for Global Governance' in Douglas Lewis (ed.) in *Global Governance and the Quest for Justice* (Vol.1, Hart Publishing, 2006)

McCormick, J. *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (Cambridge University Press, 1997)

Minca, C., Rowan, R. *On Schmitt and Space* (Routledge, 2015)

Mullerson, R. *Regime Change: From Democratic Peace Theories to Forcible Regime Change* (Martinus Nijhoff Publishers, 2013)

Murphy, S. 'The United States and the International Court of Justice: Coping with Antinomies' (George Washington Law Faculty Publications, Cesare Romano, ed., 2008)

Nijman, J., Nolkaemper, A. (ed.) *New Perspectives on the Divide Between National and International Law* (Oxford University Press, 2007)

Nowak, M. *UN Covenant on Civil and Political Rights: CCPR Commentary* (N. P. Engel, 2005)

Obama, B. *The Audacity of Hope: Thoughts on Reclaiming the American Dream* (Vintage Books, 2008)

Oberleitner, G. 'Towards an International Court of Human Rights', in Mashood, Baderin and Manisuli Ssenyonjo (eds.) *International Human Rights Law: Six Decades after the UDHR and Beyond* (Surrey, England, Ashgate Publishing, 2010)

Power, S. *A Problem from Hell: America and the Age of Genocide* (Basic Books, New York, 2002)

Roach, K. *The 9/11 Effect* (Cambridge University Press, 2011)

Saito, N. *Meeting the Enemy: American Exceptionalism & International Law* (New York University Press, 2016)

Schmitt, C. *Die Diktatur* (Berlin: Duncker & Humblot,1994)

Schmitt, C. *Dictatorship* (Cambridge: Polity Press, 2014, English trans.)

Schmitt, C. *Political Theology: Four Chapters on the Theory of Sovereignty* (1922) (George Schwab trans., Chicago: Chicago University Press, 2005)

Schwobel, C. *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff Publishers, Leiden, 2011)

Slaughter, A. *A New World Order* (Princeton University Press, 2004)

Sternhell, Z., Sznajder, M., and Asheri, M. *The Birth of Fascist Ideology: From Cultural Rebellion to Political Revolution* (Princeton University Press, 1994)

Tomuschat, C. 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', General Course on Public International Law 281 *Recueil des Cours de L'Academie de Droit International* 237 (1999)

Ulfstein, G. 'Do We Need a World Court of Human Rights?' in O. Engdahl and P. Wrange (ed.) in *Law at War: The Law as it Was and the Law as it Should be* (Martinus Nijhoff Publishers, 2008)

United Nations Office of the High Commissioner for Human Rights, International Bar Association, *Human Rights in The Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations Publications, 2003)

Verdross, A. *Die Verfassung der Volkerrechtsgemeinschaft* (1926)

Verdross, A. Simma, B. *Universelles Volkerrecht: Theorie und Praxis* (1984)

Von Bogdandy, A., Sonnevend, P. (ed.) *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart Publishing, Oxford, 2015)

Zartaloudis, T. *Giorgio Agamben: Power, Law and the Uses of Criticism* (Routledge-Cavendish, 2010)

II. Journal Articles

Abratt, D. 'Charlie Hebdo: Freedom of Expression Versus the Protection of Religious Feelings' *Florida International Law Review* (4 March 2015)

Ananian-Welsh, R., Williams, G. 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia' *Melbourne University Law Review* Vol. 38 (2) (2014)

Arato, J. 'Constitutional Transformation in ECtHR: Strasbourg's Expansive Recourse to External Rules of International Law' *Brooklyn Journal of International Law* (March 2012) Vol. 37(2)

Behrman, S. 'Giorgio Agamben in Perspective' *International Socialism: A Quarterly Review of Socialist Theory* (Issue 140, 7 October 2013)

Bell, C. 'What We Talk About When We Talk About International Constitutional Law' *Transnational Legal Theory* (2014) Vol. 5(2)

Bell, C. 'Power-Sharing and Human Rights Law' *The International Journal of Human Rights* (February 2013) Vol. 17(2)

Benvenisti, E. 'Margin of Appreciation, Consensus and Universal Standards' 31 *International Law and Pol.* (1999)

Benevenisti, E., Downs, G. 'National Courts, Domestic Democracy and the Evolution of International Law' *European Journal of International Law* (2009) Vol. 20

Bradford, A., Posner, E. 'Universal Exceptionalism in International Law' *Harvard International Law Journal* Vol. 52(3) (2011)

Burchill, R. 'When Does an Emergency Threaten the Life of the Nation? Derogations from Human Rights Obligations and the War on International Terrorism' *New Zealand Yearbook of Jurisprudence* (2005) Vol. 9

Byers, M. 'Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules' 66 *Nordic Journal of International Law* (1997)

Chen, A. 'Pathways of Western Liberal Constitutional Development in Asia: A Comparative Study of 5 Major Nations' *International Journal of Constitutional Law* (2010) Vol. 8

Cohen, S. 'Government Responses to Human Rights Reports: Claims, Denials and Counterclaims' *Human Rights Quarterly* Vol.18(3) (1996)

Crook, J. 'The International Court of Justice and Human Rights, *Northwestern Journal of International Human Rights* (Vol. 1(1) (Fall 2004))

Davis, J. 'Uncloaking Secrecy: International Human Rights Law in Terrorism Cases' *Human Rights Quarterly*, Vol. 38(1) (February 2016)

De Wet, E. 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' 19 *Leiden Journal of International Law* (2006)

Diggelmann, O., Altwicker, T. 'Is there Something like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism' *Zeitschrift fur auslandisches offentliches recht & volkerrecht* (2008) Vol. 68

Drumbl, M. 'International Criminal Law: Taking Stock of a Busy Decade', *Melbourne Journal of International Law* (2009) Vol. 10

Erdmann, G. 'Decline of Democracy: Loss of Quality, Hybridisation and Breakdown of Democracy*'* (GIGA Working Paper No 161, 23 August 2012)

Fassbender, B. 'International Constitutional Law: Written or Unwritten?' *Chinese Journal of International Law* (2016) Vol. 15(3)

Ferejohn, J., Pasquino, P. 'The Law of the Exception: A Typology of Emergency Powers' (Oxford University Press & New York University School of Law, I.CON, Vol 2(2), 2004)

Fitzpatrick, J. 'Speaking Law to Power: The War Against Terrorism and Human Rights*'* 14 *European Journal of International Law* 241 (2003)

Follesdal, A. 'The Legitimacy Deficits of the Human Rights Judiciary: Elements and Implications of a Normative Theory' *Theoretical Inquiries in Law* Vol. 14 (2013)

Franceschet, A. 'Review: The Promise of Human Rights: Constitutional Government, Democratic Legitimacy and International Law' *The Journal of Politics* (April 2017) Vol.79(2)

Ghandhi, S. 'Human Rights and the International Court of Justice: The Ahmadou Sadio Diallo Case' *Human Rights Law Review* (Vol 11(3)) (2011)

Gibney, M., Roxstrom, E. 'What a Pity! Sovereign Immunity, State Responsibility and the Diminution of Accountability under International Human Rights Law' *Journal of Human Rights* (1 October 2012) Vol. 11(4)

Gray, A. 'The Manifestation of Religious Belief Through Dress: Human Rights and Constitutional Issues (Special Issue on Islamic Law)' *European Journal of Law Reform* (Summer 2014) Vol. 16(2)

Gross, O. 'The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the Norm-Exception Dichotomy' (Symposium- Carl Schmitt: Legacy and Prospects- An International Conference in New York City: Exception and Emergency Powers) 21 *Cardozo Law Review* (1999-2000)

Hahm, C. 'Beyond Law v Politics in Constitutional Adjudication: Lessons from South Korea' *International Journal of Constitutional Law* (2012) Vol. 10

Head, M. 'The Haneef Inquiry: Some Unanswered Questions' (2009) 2 *Journal of the Australasian Law Teachers Association* 99

Hickman, T. 'Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism' 68 *Modern Law Review* (2005)

Hickman II, P. 'The Lore of the Laws of War: Textual Constructions of Archetypal Identities in the War on Terrorism' (Dissertation, Arizona State University, ProQuest, April 2014)

Hoehne, O. 'Special Procedures and the New Human Rights Council- A Need for Strategic Positioning' *Essex Human Rights Review* (February 2007, Vol 4(1))

Hovell, D. ‘The Sovereignty Stratagem: Australia’s Response to UN Human Rights Treaty Bodies’ *Alternative Law Journal* (2003) Vol. 28

Humphreys, S. ‘Legalizing Lawlessness: On Giorgio Agamben’s State of Exception’ *The European Journal of International Law* Vol. 17 (3) (2006)

Huq, A., Ginsburg, T. ‘How to Lose a Constitutional Democracy’ *UCLA Law Review* Vol. 65 (2018)

Kirby, M. ‘Terrorism: The International Response of the Courts (The Institute for Advanced Study Branigin Lecture) *Indiana Journal of Global Legal Studies* (Winter 2005) Vol. 12(1)

Kleinlein, T. ‘Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law’ *Nordic Journal of International Law* Vol. 81

Levinson, S., Balkin, J. ‘Constitutional Crises’ *University of Pennsylvania Law Review* (February 2009) Vol. 157 (3)

Mattie, S. ‘Prerogative and the Rule of Law in John Locke and the Lincoln Presidency’ *Review of Politics* (Winter 2005) Vol. 67(1)

McClelland, C. ‘The Acute International Crisis’, *World Politics* Vol. 14 (1961)

McCrudden, C. ‘A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights’ *Oxford Journal of Legal Studies* (2000) Vol. 20

McGarrity, N. '"Testing" our Counter-Terrorism Laws: The Prosecution of Individuals for Terrorism Offences in Australia' (2010) Vol. 34 *Criminal Law Journal* 92

McGoldrick, D. 'The Interface between Public Emergency Powers and International Law' Vol. 2 *International Journal of Constitutional Law* (2004)

Miller, A. 'Constitutional Law: Crisis Government Becomes the Norm' 39 *Ohio State Law Journal 736* (1978)

Nasrawin, L. 'An International Constitutional Court: Future Roles and Challenges' *Digest of Middle East Studies* Vol. 25 (No 2) (2016)

Payne, L., Lessa, F., and Pereira, G. 'Overcoming Barriers to Justice in the Age of Human Rights Accountability' *Human Rights Quarterly* Vol 37(3) August 2015)

Preuss, U. '*Abschiedsvorlesung an der Freien Universitat'*, z. T. in der FAZ, (9 May 2006)

Ranciere, J. 'Who is the Subject of the Rights of Man?' *South Atlantic Quarterly* (2004) Vol. 103 (2-3)

Rensmann, L. 'National Sovereigntism and Global Constitutionalism: An Adornian Cosmopolitan Critique' *Critical Horizons* (February 2016) Vol. 17(1)

Sanders, R. '(Im)Plausible Legality: The Rationalisation of Human Rights Abuses in the American "Global War on Terror"' *The International Journal of Human Rights* Vol.15(4) (2011)

Schwobel, C. 'Situating the Debate on Global Constitutionalism', *International Journal of Constitutional Law* (2010) Vol. 8 (3)

Schwobel, C. 'Organic Global Constitutionalism' *Leiden Journal of International Law* (2010) Vol. 23(3)

Setty, S. 'Litigating Secrets: Comparative Perspectives on the State Secrets Privilege' *Brooklyn Law Review* Vol 75 (2009)

Sheeran, S. 'Reconceptualising States of Emergency under International Human Rights Law: Theory, Legal Doctrine and Politics' *Michigan Journal of International Law* Vol. 34(3) (2013)

Snyder, J., and Vinjamuri, L. 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' *International Security Journal* 28(5) (2003)

Terwilliger, G., Cooperstein, T., Gunnarson, S., Blumenthal, D., and Parker, R. 'The War on Terrorism: Law Enforcement or National Security?' *The Federalist Society for Law and Public Policy Studies* (15 February 2005)

Thompson-Flores, T. 'The International Criminal Court: Will it Succeed or Fail? Determinative Factors and Case Study on this Question' *Loyola University Chicago International Law Review* (Vol. 8(1), 2010)

Uerpmann, R. 'Internationales Verfassungsrecht' 56 *Juristen Zeitung* (2001)

Whittington, K. 'Yet Another Constitutional Crisis?' *William &Mary Law Review* (2002) Vol. 43 (5)

Williams, G. ‘A Decade of Australian Anti-Terror Laws’, *Melbourne University Law Review* Vol. 35 (2011)

III. International Law/Sources (Chronological Order)

United Nations, Charter of the United Nations, 24 October 1945 1 UNTS XVI

The Universal Declaration of Human Rights (1948) (General Assembly Resolution 217A)

Conditions of Admission of State to Membership in United Nations’ (Article 4, UN Charter) I.C.J. 63 (28 May 1948)

The Geneva Conventions (1949)

Geneva Convention III on Prisoners of War (1949)

UN Doc. E/ CN.4/ SR. 126 (1949)

The European Convention on Human Rights (1950)

The Charter of the Organisation of American States (1951)

Treaty Establishing the European Coal and Steel Community, commonly referred to as The Treaty of Paris (1951)

UN Secretary-General, *Annotations on the Text of the Draft International Covenants on Human Rights,* Ch. V, para 36, UN Doc A/2929 (July 1 1955)

The International Covenant on Civil and Political Rights (1966) S. Treaty Doc No 95-20, 999 U.N.T.S. 171.

Optional Protocol to the International Covenant on Civil and Political Rights (1966)

International Covenant on Economic, Social and Cultural Rights (1966)

The American Convention on Human Rights (1969)

Vienna Convention of the Law of Treaties (1969)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), adopted 10 December 1984, GA Res 39/46

Nicaragua v *United States* ICJ 14 (27 June 1986)

United Nations Convention on the Rights of the Child (UNCRC) (1989)

Second Optional Protocol to the International Covenant on Civil and Political Rights (1989)

Harare Commonwealth Declaration (1991)

Communication No 322/1988, Submitted by Hugo Rodriguez. (adopted 9 August 1994) UN GAOR, Hum. Rts. Comm., 51st Session

Special Rapporteur for States of Emergency, *The Administration of Justice and the Human Rights of Detainees: Questions of Human Rights and States of Emergency: Final Report* UN Doc E/CN.4/Sub.2/1997/19.Add.1 (9 June 1996)

Legality of the Threat or Use of Nuclear Weapons' ICJ 240 (8 July 1996)

Rome Statute of the International Criminal Court, U.N. Doc A/ CONF. 183/9 (1998)

Vienna Convention of Consular Relations (Paraguay v United States), ICJ 248 (9 April 1998)

The Constitutive Act of the African Union (2000)

The Inter-American Democratic Charter (2001)

LaGrand (F.R.G v United States), ICJ 104 (27 June 2001)

Human Rights Committee, 'General Comment No 29: States of Emergency' 2,4 UN Doc. CCPR/C/21/Rev.1/Add.11 (August 31, 2001)

General Comment No. 29: States of Emergency (Article 4) Adopted 31 August 2001 UN GAOR, Hum. Rts. Comm., 1950th mtg.

Security Council Resolution 1373, UN SCOR, 56th session, 4385th Meeting, UN Doc S/RES/1373 (28 September 2001)

General Assembly Resolution ES-10/14 (December 12, 2003)

Arab Charter for Human Rights (2004)

Written Statement of the United States of America, paras 3.3 – 3.10 (filed 30 January 2004), Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (ICJ, 9 July 2004)

United Nations Declaration of Principles for International Election Observation and Code of Conduct for Election Observers (2005)

United Nations General Assembly, Human Rights Council, 'Report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' (13th Session, 22 January 2010) A/ HRC/ 13/ 36)

His Excellency Mr. Moncef Marzouki, President of Tunisia, 'Statement Summary' (General Assembly of the United Nations, 67th Session, 27 September 2012) Transforming Our World: The 2030 Agenda for Sustainable Development' (A/RES/70/1) (2015)

IV. Domestic Legislation/ Cases (Chronological Order)

A. GERMANY

Constitution of the Weimar Republic of Germany (1919-1933)

The Enabling Act (1933), Amendment to the Weimar Constitution, (German: Ermachtigungsgesetz)

B. THE UNITED STATES

The Constitution of the United States (1789)

Brown v *United States* 12 U.S. [8 Cranch] 110, 125-126 (1814) (USA)

Totten v *United States* 92 US 105 (1875)

Immigration and Naturalization Act 8 U.S.C. S.1152 (1952)

United States v *Reynolds* 345 US 1, 11 n. 26 (1953)

USA PATRIOT ACT, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (26 October 2001, 107th Congress)

'Authorization for Use of Military Force' Senate Joint Resolution 23 (107th Congress, United States, 2001-2002)

Doe v *Ashcroft* 334 F. Supp. 2D 471 (S.D.N.Y) (2004)

Rasul v *Bush* 124 S. Ct 2686 (2004)

Military Commissions Act (2006) (United States, 109th Congress)

Hamdan v Rumsfeld, 548 U.S. 557 (2006)

Mohamed v *Jeppesen Dataplan Inc* 539 F. Supp. 2d 1128, 1130 (N.D. Cal 2008)

Mohamed v *Jeppesen Dataplan Inc* 614 F.3d 1070, 1074 (9th Cir. 2010)

Padilla v *Kentucky*, 124 S. Ct at 2735 (2010)

The USA Freedom Act (2015), The Uniting and Strengthening America by Fulfilling Rights and Ending Eavesdropping, Dragnet-Collection and Online Monitoring Act (2 June 2015, 114th Congress)

Executive Order 13769 82 FR 8977 (United States, 27 January 2017)

Executive Order 13780 82 FR 13209 (United Sates, 6 March 2017)

C. AUSTRALIA

Crimes Act (1914)

The Australian Constitution: Commonwealth of Australia Constitution Act (1990)

Mabo v *Queensland* [No 2] (1992) 175 C. L. R 1, 42

The New South Wales Freedom of Information (Terrorism and Criminal Intelligence) Act (2003)

Anti-Terrorism Act (No 2) (2005)

R v *Lodhi* (2006) 163 A Crim R 448

Lodhi v The Queen (2007) 179 A Crim R 470, 487-488 [66] – [67]

Thomas v *Mowbray* (2007) 233 CLR 307

Serious and Organised Crime (Control) Act 2008

South Australia v Totani (2010) 242 CLR 1.

R v *Elomar* (2010) 264 ALR 759, 779 [79]

Counter-Terrorism White Paper: Securing Australia- Protecting Our Community (2010)

South Australia v *Totani* (2010) 242 CLR 1

Wainohu v *New South Wales* (2011) 243 CLR 181.

National Security Legislation Amendment Bill (No 1) (2014)

D. FRANCE

The Declaration of the Rights of Man and of the Citizen (1789)

The Constitution of the Fourth Republic (1946)

The Constitution of the Fifth Republic (1958)

Constitutional Council (71-44DC) (1971)

TGI Paris 17e ch. Corr., 22 March 2007, Case No 2007-327959

E. EUROPEAN COURT OF HUMAN RIGHTS

A &Others v *United Kingdom*, App. No 3455/05 para 175-181 (2009)

F. THE REPUBLIC OF KOREA

Constitution of the Republic of Korea (1948)

G. HAITI

Constitution (1987)

The Electoral Law (2008)

H. THE RUSSIAN FEDERATION

Constitution of the Russian Federation (1993)

V. Internet Sources

Abraham, D. 'The Bush Regime from Elections to Detentions: A Moral Economy of Carl Schmitt and Human Rights' *University of Miami Legal Studies Research Paper no 2007-20* (October 2006, University of Miami) Available at: http://ssrn.com/abstract=942865

ACLU, 'The USA PATRIOT Act and Government Actions that Threaten Our Civil Liberties' Available at: https://www.aclu.org/files/FilesPDFs/patriot%20act%20flyer.pdf

ACLU, 'Does the USA Patriot Act Diminish Civil Liberties?' (2008) Available at: http://aclu.procon.org/view.answers.php?questionID=000716

Alexander, C. 'Tunisia's Protest Wave: Where it Comes from and What It Means' (3 January 2011, Foreign Policy) Available at: http://foreignpolicy.com/2011/01/03/tunisias-protest-wave-where-it-comes-from-and-what-it-means/

Amnesty International, 'The Arab Spring: Five Years On' (Amnesty International) Available at: https://www.amnesty.org/en/latest/campaigns/2016/01/arab-spring-five-years-on/

Annan, K. 'A Global Strategy for Fighting Terrorism' (Speech delivered at the Closing Plenary of the International Summit on Democracy, Terrorism and Security, Madrid, 10 March 2005) Available at: https://www.un.org/sg/en/content/sg/statement/2005-03-10/secretary-generals-keynote-address-closing-plenary-international

Associated Press, 'Former South Korean President Facing Possible Life Sentence' (Associated Press, The Guardian, 17 April 2017) Available at: https://www.theguardian.com/world/2017/apr/17/former-south-korean-president-park-geun-hye-facing-possible-life-sentence

Australian Human Rights Commission, 'Inquiry into the National Security Legislation Amendment Bill (No 1) 2014' (21 August 2014) Available at: https://www.humanrights.gov.au/sites/default/files/14.08.21%20NationalSecurityAmendmentBillNo_1%20Submission_Final.pdf

Baington, C., Abramowitz, M. 'US Shifts Policy on Geneva Conventions' (12 July 2006, The Washington Post) Available at: http://www.washingtonpost.com/wp-dyn/content/article/2006/07/11/AR2006071100094.html

Baldridge, M. 'Executive Orders in President Trump's first 10 days' (National Constitution Centre, 4 February 2017) Available at: https://constitutioncenter.org/blog/executive-orders-in-president-trumps-first-10-days/

Barns, G. 'Welcome to Authoritarian Australia, where more Anti-Terror Laws won't keep us safe', (The Guardian, 13 October 2015) Available at: https://www.theguardian.com/commentisfree/2015/oct/13/welcome-to-authoritarian-australia-where-more-anti-terror-laws-wont-keep-us-safe

BBC News, 'South Korea Sees Largest Protests Against President Park Gyeun-hye' (BBC News, 26 November 2016) Available at: http://www.bbc.com/news/world-asia-38114558

BBC News, 'Moon Jae-In: South Korean Liberal Claims Presidency' (BBC News, 9 May 2017) Available at: http://www.bbc.com/news/world-asia-39855956

BBC News, 'Taking in Trump: Is the US facing a constitutional crisis?' (6 February 2017, BBC News) Available at: http://www.bbc.com/news/world-us-canada-38881119.

Bischoff, P. 'A Breakdown of The Patriot Act, Freedom Act and FISA', (Comparitech: VPN & Privacy, 6 October 2016) Available at: http://www.comparitech.com/blog/vpn-privacy/a-breakdown-of-the-patriot-act-freedom-act-and-fisa/#different

Bybee, J. 'Standards of Conduct for Interrogation under 18 U.S.C. S2340-2340A' (1 August 2002, US Department of Justice, Office of Legal Counsel) Available at: http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf

Bybee, J. 'Memorandum for John A. Rizzo, Acting General Counsel of the Central Intelligence Agency: Interrogation of Al Qaeda Operative' (US Department of Justice, Office of Legal Counsel, 1 August 2002) Available at: https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-bybee2002.pdf

Cambridge Advanced Learner's Dictionary and Thesaurus, Cambridge University Press. Available at: http://dictionary.cambridge.org/dictionary/english/if-it-ain-t-broke-don-t-fix-it

Carver, T. 'Review of 2001, Bush: Man with a Mission' (2 January 2002, BBC News, World Edition) Available at: http://news.bbc.co.uk/2/hi/in_depth/world/2001/review_of_2001/1717313.stm

Chaplin, C. Final Speech in *'The Great Dictator'* (Charles Chaplin Film Corporation, 1940). Transcript available at:

http://www.charliechaplin.com/en/synopsis/articles/29-The-Great-Dictator-s-Speech.

Chemillier-Gendreau, M. 'How to Enforce Guarantees of Freedom: The Court of Democracy' (September 2013, Le Monde Diplomatique). Available at: http://mondediplo.com/2013/09/02democracy

Constitutional Rights Foundation, 'The Patriot Act: What is the Proper Balance Between National Security and Individual Rights?' Available at: http://www.crf-usa.org/america-responds-to-terrorism/the-patriot-act.html

Cook, J. 'Thousands Protest in Iceland After Prime Minister Refuses to Step Down' (4 April 2016, Huffington Post) Available at: http://www.huffingtonpost.com/entry/iceland-protests-panama-papers_us_5702a58ee4b0a06d58064555

Council on Foreign Relations, 'The Arab Spring and International Constitutionalism: A Conversation with Mohamed Moncef Marzouki' (23 September 2013, Council on Foreign Relations) Transcript Available at: http://www.cfr.org/tunisia/arab-spring-international-constitutionalism/p35507.

Davis-Roberts, A., Carroll, D. 'Using International Law to Assess Elections', (Democracy Program, The Carter Center, USA, 2010) p.3 Available at: https://www.cartercenter.org/resources/pdfs/peace/democracy/des/internationallaw-assesselections-prepub.pdf

Deen, M. 'France's Indefinite State of Emergency is a Mistake' (Bloomberg, 12 October 2016) Available at: http://www.bloomberg.com/news/articles/2016-10-11/france-s-indefinite-state-of-emergency-is-a-mistake-macron-says

El Abdallah, F., Schabas, W. (Prof.) 'Interview: Pros and Cons of the ICC' (30 June 2012) Available at: http://www.dw.com/en/interview-pros-and-cons-of-the-icc/a-16063112

Elkins, Z., Ginsburg, T., and Melton, J. 'A Review of Iceland's Draft Constitution' (The Comparative Constitutions Project, 14 October 2012) Available at: http://comparativeconstitutionsproject.org/wp-content/uploads/CCP-Iceland-Report.pdf

Elliott, A. 'Iceland Political Crisis: The Latest' (8 April 2016, Iceland Review) Available at: http://icelandreview.com/news/2016/04/08/iceland-political-crisis-latest

Eltham, B. 'Abbott's Anti-Terror Laws are the Real Danger to Australia' (23 September 2014) Available at: https://newmatilda.com/2014/09/23/abbotts-anti-terror-laws-are-real-danger-australia/

England, P. 'Iceland's "Pots and Pans Revolution": Lessons from a Nation that People Power Helped to Emerge from its 2008 Crisis All the Stronger' (28 June 2015, The Independent) Available at: http://www.independent.co.uk/news/world/europe/icelands-pots-and-pans-revolution-lessons-from-a-nation-that-people-power-helped-to-emerge-from-its-10351095.html

Feneley, R. 'Sydney Siege: Man Haron Monis "humanitarian" and terrorist' (The Sydney Morning Herald, 20 December 2014) Available at: http://www.smh.com.au/nsw/sydney-siege-man-haron-monis-humanitarian-and-terrorist-20141219-12ajn5.html

Frewer, T. ‘A Love of Sovereignty: Borders, Bureaucracy and The Rohingya Crisis-Analysis’ (Eurasia Review, 22 December 2015) Available at: http://www.eurasiareview.com/22122015-a-love-of-sovereignty-borders-bureaucracy-and-the-rohingya-crisis-analysis/

Friedersdorf, C. ‘Is One Man’s Terrorist Another Man’s Freedom Fighter?’ (16 May 2012, The Atlantic) Available at: https://www.theatlantic.com/politics/archive/2012/05/is-one-mans-terrorist-another-mans-freedom-fighter/257245/

FOX News, ‘List of Trumps’ Executive Orders’ (20 April 2017, FOX News) Available at: http://www.foxnews.com/politics/2017/04/20/list-trumps-executive-orders.html

Gajanan, M. ‘Texas Democrat Calls for President ‘Trump’s Impeachment on House Floor’ (17 May 2017, TIME) Available at: http://time.com/4782225/al-green-congress-donald-trump-impeachment/

Gulli, B. ‘The Sovereign Exception: Notes on Schmitt’s Word that Sovereign is He Who Decides on the Exception’ (September 2009) Available at: https://www.researchgate.net/publication/38105215_The_Sovereign_Exception_Notes_on_Schmitt%27s_Word_that_Sovereign_is_He_Who_Decides_on_the_Exception

Innis, M. ‘Terrorism Cited in Killing in Australia’ (6 October 2015, The New York Times) Available at: https://www.nytimes.com/2015/10/07/world/asia/parramatta-australia-shooting-terrorism-cited.html?_r=1

Institute for Democracy and Electoral Assistance, ‘International Constitutional Court Proposed to Protect Democracy’ (IDEA, 4 May 2013). Available at:

http://ec2-174-129-218-71.compute-1.amazonaws.com/wana/international-constitutional-court-proposed-to-protect-democracy.cfm

Institute for Justice and Democracy in Haiti, 'Haiti's November 28 Elections: Trying to Legitimize the Illegitimate' (IJDH, 22 November 2010) p.3. Available at: http://ijdh.org/wordpress/wp-content/uploads/2010/11/Election-Report-11-23-2010.pdf

International Commission of Jurists, 'Towards a World Court of Human Rights: Questions and Answers' (Supporting Paper to the 2011 Report of the Panel on Human Dignity, December 2011) Available at: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/07/World-court-final-23.12-pdf1.pdf

International Criminal Court, 'Understanding the International Criminal Court' Available at: https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf

International Court of Justice, 'The Court' Available at: http://www.icj-cij.org/en/court

International Court of Justice, 'How the Court Works' Available at: http://www.icj-cij.org/en/how-the-court-works

Jakobsson, N. 'The 2016 ICC Budget – More Money, More Problems?' (Justice Hub, 17 September 2015) Available at: https://justicehub.org/article/2016-icc-budget-more-money-more-problems

Jonsdottir, B. 'Lessons from Iceland: The People Can Have the Power' (15 November 2011, The Guardian) Available at: https://www.theguardian.com/commentisfree/2011/nov/15/lessons-from-iceland-people-power

Jurecic, Q. ‘Transition 2016: Donald Trump’s State of Exception’ (14 December 2016, Lawfare Blog) Available at: https://lawfareblog.com/donald-trumps-state-exception

Kennedy, J.F. (Former President of the United States), ‘Speech at United Negro College Fund’ (Fundraiser, Indianapolis Indiana, 12 April 1959) Available at: https://www.jfklibrary.org/Research/Research-Aids/Ready-Reference/JFK-Quotations.aspx#C

Kerr, O. ‘Trump wants to protect Article XII of the Constitution’ (The Washington Post, 7 July 2016) Available at: https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/07/07/trump-wants-to-protect-article-xii-of-the-constitution/?utm_term=.38d47dab7a03

Leahy, P. (Sen.) ‘Comment on Partisan Attacks on the Federal Judiciary’ (4 February 2017) Available at: https://www.leahy.senate.gov/press/comment-on-partisan-attacks-on-the-federal-judiciary

Le Figaro, ‘Voile a l’universite: Macron prend le contre-pied de Valls’ (Le Figaro, 12 July 2016) (In French) Available at: http://www.lefigaro.fr/flash-actu/2016/07/12/97001-20160712FILWWW00348-voile-a-l-universite-macron-prend-le-contre-pied-de-valls.php

Love, B. ‘No Rules, No Regrets for French Cartoonists in Mohammed Storm’ (Reuters, 19 September 2012) Available at: http://www.reuters.com/article/film-protests-charlie-idUSL5E8KJE6320120919

Marzouki, M. (Former President of Tunisia) ‘Tunisia to Submit to UN Plan to Set Up International Constitutional Court’ (AllAfrica.com; Washington, 11 September 2012).

McCurry, J. 'South Korea Impeachment Vote: The Key Facts Behind a Presidential Crisis' (The Guardian, 9 December 2016) Available at: https://www.theguardian.com/world/2016/dec/09/south-korea-impeachment-vote-the-key-facts-behind-a-presidential-crisis

McCurry, J. 'Park Geun-hye: South Korean Court Removes President Over Scandal' (The Guardian, 10 March 2017) Available at: https://www.theguardian.com/world/2017/mar/10/south-korea-president-park-geun-hye-constitutional-court-impeachment

Noorlander, P. 'When satire incites hatred: Charlie Hebdo and the freedom of expression debate' (27 January 2015, Media Legal Defence Initiative) Available at: http://journalism.cmpf.eui.eu/discussions/when-satire-incites-hatred/

Obama, B. (Former President of the United States) 'Nobel Lecture: A Just and Lasting Peace' (Oslo, 10 December 2009) Available at: https://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html

Partlett, W. 'The Constitutionality of Vladimir Putin's Third Term' (Brookings, 9 March 2012) Available at: https://www.brookings.edu/opinions/the-constitutionality-of-vladimir-putins-third-term/

Pillay, N. 'Strengthening the United Nations Human Rights Treaty Body System: A Report by the United Nations High Commissioner for Human Rights' (United Nations Office of the High Commissioner, June 2012) Available at: http://www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBStrengthening.pdf

Reuters, 'South Korea: Park Geun-hye Breaks Silence as She Leaves Official Residence' (Reuters, The Guardian, 12 March 2017) Available at:

https://www.theguardian.com/world/2017/mar/12/south-korea-presidential-frontrunner-stresses-need-to-embrace-north

Reuters, 'Five Killed in Second Day of Charlie Hebdo Protests in Niger' (Reuters, 17 January 2015) Available at: http://www.reuters.com/article/us-france-shooting-niger-idUSKBN0KQ0BP20150117

Reuters, 'Danish Police Kill 22-year old suspected of Copenhagen shootings', (Reuters, 15 February 2015) Available at: http://www.reuters.com/article/2015/02/15/us-denmark-shooting-idUSKBN0LI0N720150215.

Roosevelt III, K. (Professor of Constitutional Law at The University of Pennsylvania Law School) 'Executive Order 13769: America at its Best and its Worst' (1 February 2017, Foreign Policy Research Institute) Available at: http://www.fpri.org/article/2017/02/executive-order-13769-america-best-worst/

Roth, K. 'Africa Attacks the International Criminal Court' (Human Rights Watch, 14 January 2014) Available at: https://www.hrw.org/news/2014/01/14/africa-attacks-international-criminal-court

Scheinin, M. 'Towards a World Court of Human Rights', Swiss Initiative to Commemorate the 60th Anniversary of the UDHR (June 2009). Available at: http://www.enlazandoalternativas.org/IMG/pdf/hrCourt_scheinin0609.pdf

Silvester, J. 'Melbourne Terror Shooting: Numan Haider Planned to Behead Victoria Police Officers, Drape Bodies in IS Flag', (The Sydney Morning Herald, 24 September 2014) Available at: http://www.smh.com.au/victoria/melbourne-terror-shooting-numan-haider-planned-to-behead-victoria-police-officers-drape-bodies-in-is-flag-20140924-10lb4i.html

Stanford Encyclopedia of Philosophy, 'Carl Schmitt', *Stanford Encyclopedia of Philosophy* (1 October 2014). Available at: https://plato.stanford.edu/entries/schmitt/

Stille, A. 'Why French Law Treats Dieudonne and Charlie Hebdo Differently' (15 January 2015, The New Yorker) Available at: http://www.newyorker.com/news/news-desk/french-law-treats-dieudonne-charlie-hebdo-differently.

Suter, K. (Dr) 'The International Court of Justice' (Global Directions) Available at: http:/www.global-directions.com/Articles/Global%20Politics/InternationalCourtofJustice.pdf

Suu Kyi, A. 'Freedom from Fear' (Speech, 1990) Available at: 'Aung San Suu Kyi's Essay "Freedom from Fear"', (Asia Society, 2011) http://sites.asiasociety.org/asia21summit/wp-content/uploads/2011/02/1.-Aung-San-Suu-Kyi-Freedom-from-Fear.pdf

Terpstra, M., De Wit, T. 'Walter Benjamin and Carl Schmitt: A Political-Theological Confrontation'. Available at: http://marinterpstra.ruhosting.nl/publicaties.html.

The Economist, 'Why won't America Ratify the UN Convention on Children's Rights?' (The Economist, 7 October 2013) Available at: http://www.economist.com/blogs/economist-explains/2013/10/economist-explains-2

The Economist, 'Pushing the Limits' (The Economist, 15 October 2014) Available at: http://www.economist.com/blogs/banyan/2014/10/australia-and-terrorism

The Economist, 'A Nightmare Comes True', (The Economist, Print Ed., 18 December 2014) Available at: http://www.economist.com/news/asia/21636793-caf-siege-will-spark-fresh-debate-about-vulnerability-terrorism-nightmare-comes-true

The EU-Russia Centre Review, 'The Electoral System of the Russian Federation', (EU-Russia Centre, Issue 17, April 2011) pp.4-5. Available at: http://www.eu-russiacentre.org/wp-content/uploads/2008/10/Review17.pdf

The Guardian, 'Russian Computer Programmer Held in Spain under US Warrant', (10 April 2017, The Guardian News) Available at: https://www.theguardian.com/world/2017/apr/10/russian-computer-programmer-held-in-spain-under-us-warrant

The Independent, 'Charlie Hebdo Shooting: At least 12 killed as shots fired at satirical magazine's Paris Office' (7 January 2015, The Independent) Available at: http://www.independent.co.uk/news/world/europe/charlie-hebdo-shooting-10-killed-as-shots-fired-at-satirical-magazine-headquarters-according-to-9962337.html

The New York Times, 'Haiti Deserves a Legitimate Election', (The New York Times, Sunday Review, 12 December 2015) Available at: https://www.nytimes.com/2015/12/13/opinion/sunday/haiti-deserves-a-legitimate-election.html?_r=0

The Sydney Herald, 'Haneef Compensation "About $1 m"', (The Sydney Herald, 22 December 2010)

Ulrich, L. (National Constitution Centre), 'The Constitutional Debates over the Military Prison at Guantanamo Bay' (9 September 2016) Available at: https://constitutioncenter.org/blog/the-constitutional-debates-over-the-military-prison-at-guantanamo-bay

United Nations Office of the High Commissioner, 'International Human Rights Law'. Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx.

United Nations Office of the High Commissioner for Human Rights, 'United Nations Human Rights Council'. Available at: http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx .

United Nations Peacekeeping, 'Peacekeeping Fact Sheet' (31 May 2017) Available at: http://www.un.org/en/peacekeeping/resources/statistics/factsheet.shtml

United Nations Human Rights: Office of the High Commissioner, 'OHCHR'S Funding and Budget' Available at: http://www.ohchr.org/EN/AboutUs/Pages/FundingBudget.aspx

United Nations, 'Growth in United Nations Membership, 1945- Present'. Available at: http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html

Weber, A. 'Freedom of Speech in France' (Library of Congress, 27 March 2015) Available at: https://blogs.loc.gov/law/2015/03/falqs-freedom-of-speech-in-france/

Weisbrot, M. 'OAS Backs Illegitimate Election in Haiti in Which Three-Quarters of Haitians Didn't Vote' (The Guardian Unlimited, 10 January 2011) Available at: http://cepr.net/publications/op-eds-columns/oas-backs-illegitimate-election-in-haiti

Williams, G. 'Anti-Terror Laws and Australia' (University of New South Wales) Available at: http://www.law.unsw.edu.au/news-events/anti-terror-laws-and-australia-%E2%80%93-professor-george-williams.

Won, Y. ‘South Korean Candle Light Protest 2016’ (9 December 2016) Available at: http://www.europe-solidaire.org/spip.php?article39695

Abstract

권위주의 세력의 부상에 맞서 인권을 보호하는 국제법이 지닌 한계: "국제 헌법재판소" 건립을 위한 제안

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지금 국제 공동체는 조각나 있다. 세계는 완전히 글로벌화되어 연결되어 있고, 갈등 상태에 있는 정치적 연합과 이해 관계를 중립화하고, 균형을 잡는 권력 분산 구조와 기구가 여럿 있음에도 불구하고, 권위주의와 국수주의가 점점 활개를 치고 있다. 이러한 상황은 국가 간 긴장에 의해 계속 악화되고 있으며, 이러한 긴장은 종종 국가들이 결국 본격적인 군사 개입 및/또는 무력 행사를 선택하게끔 한다. 하지만 이는 명백히 국제법을 위반하는 행위이다.

그리하여 우리 중 많은 이들은 '공포 상태'에 살고 있다. 여기서 우리의 정치 대표자들은 모르는 '타인'에 대한 공포를 불어넣고, 이것을 정치적으로 유리한 정책을 실행하는데 이용하며, 자신의 헌법적 인권 의무에서 벗어나 '예외 상태'가 정당화된다고 들먹인다.

이러한 '공포 상태'에서 우리는 영구적인 '예외 상태'에 눈이 멀고, 이 속에 갇히게 된다. 국민들이 국가 고립주의 및 자신이 살고 있는 자국의 헌법과 인권 보호를 위하여 무시한 국제기구 및 국제법은 최종 피해자로 드러난다.

나는 권위주의적 국가에 의한 향후 이탈을 막기 위하여 국제법의 헌법과 그 권한을 강화하여, 국제법 시행 가능성 및 영향력에 대한 예측불가능성과 맞서야 한다고 주장하는 바이다. 특히 인권 보호와 관련하여 이러한 국제법의 역할이 중요하다.

1999 년 튀니지 정부에서 전 튀니지 대통령 모하메드 몬세프 마르주키(Mohamed Moncef Marzouki)는 국제 공동체에 "국제 헌법재판소"의 건립을 제안했다. 이것은 비헌법적 행동과 선출을 맹렬히 비난하기 위한 것이다. 이러한 노력들이 "국제 헌법재판소"의 건립을 위하여 나아가고 있지만, 본 논문에서 필자는 그 다음 주자가 되어, 이론적인 면에서 그러한 기관의 필요성을 계속해서 발전시킬 수 있기를 희망한다.

미디어는 매일 우리가 집단적으로 두려워해야 할 새로운 집단, 개인, 그리고 국가에 대해 전하고 있다. 하지만 장기적으로 보면, 공포와 고립주의는 우리가 두려워하도록 가르침을 받는 행동보다 인권의 지위에 더 큰 해악이 될 것이다. 그러한 원초적 본능은 충동적이고 직관력이 떨어지며, 국제기관과 국제법에 의해 이뤄진 수십 년간의 진보를 훼손하게 될 것이다. 그러한 상황을 막는 것이 국제기관과 국제법의 임무이고, 우리는 이것이 가능하도록 이들에게 권한을 부여해야만 한다.

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키워드: 국제 헌법재판소, 국제법, 인권, 권위주의, 세계 헌법주의, 예외 상태.

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